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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: November 22, 1965

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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IN THE

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OCTOBER TERM, 1965

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Opinions Below and Prior Opinion of This Court

The opinion of the Court of Appeals is reported at 350 F.2d 321 (1965). The opinion of the Disfrict Court denying petitioner's post-trial motions is reported at 231 F.Supp. 663 (1964). This Court's prior opinion, *United States* v. *National Dairy Products Corporation,* upholding the constitutionality of Section 3 of the Robinson-Patman Act, is reported at 372 U.S. 29 (1963).[1] These opinions are printed in Appendix A hereto, pp. A-1 through A-71.[2]

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1. An earlier appeal taken to this Court by the Government from an order of the district court dismissing defendant Wise, United States v. Wise, is reported at 370 U.S. 405 (1962).

2. Pages in the appendices are hereinafter cited "App. ....."

Jurisdiction

The judgment of the Court of Appeals was dated and entered August 27, 1965 (App. 35). A timely petition for rehearing filed September 15, 1965 was denied September 23, 1965 (App. 36). The time for filing this petition was extended to November 23, 1965 by Mr. Justice White by order dated October 6, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether defendant was denied a fair trial in this federal criminal action when Government counsel utilized selected portions of transcripts of their grand jury testimony to refresh recollections of key witnesses upon points critical to the Government's case, and the trial judge denied to defense counsel inspection of the selected portions of the transcripts so used and other portions relating to the same subject matter.

2. Whether the trial court's instructions relating to defendant's claimed criminal violation of Section 3 of the Robinson-Patman Act, in allegedly selling milk below cost for the purpose of destroying competition, misapplied the prior decision of this Court (*United States* v. *National Dairy Products Corporation,* 372 U.S. 29 (1963); App. 62-71), in that such instructions, over defense objections (a) failed to define "cost," but left the question of its meaning to the jury; (b) failed to charge that "specific" intent to destroy competition is a necessary element of the alleged offense and may not be presumed and, instead, charged in terms of "general" intent, *i.e.,* that persons are chargeable with the consequences of their acts and are presumed to intend them; and (c) placed upon defendant the burden of justifying its challenged prices on the basis of an erroneously stated "good faith meeting competition defense" drawn from Section 2(b) of the Clayton Act, as amended

by the Robinson-Patman Act, applicable in civil price discrimination cases.

Statutes and Rule Involved

Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . ."

Section 3 of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13a, provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Rule 6(e) of the Federal Rules of Criminal Procedure (18 U.S.C.), governing the disclosure of testimony before a grand jury, and pertinent portions of Sections 2(a) and 2(b) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §§ 13(a) and 13(b), are printed in Appendix B hereto (App. 71-72).

STATEMENT

Through its Sealtest Foods Division ("Sealtest"), petitioner engages, among other things, in the processing and distribution of fluid milk. Sealtest's Kansas City, Missouri plant, distributing milk packaged primarily in paper containers, serves the greater Kansas City area and rural areas in Missouri and eastern Kansas, the former through company-operated routes and the latter through distributors, in competition with numerous other dairy companies, large and small, some selling milk in paper containers and some in glass containers, including glass gallon jugs.

On September 16, 1959, an indictment containing fifteen counts was returned by a grand jury in Kansas City, Missouri.[3] Eight counts charged that Sealtest engaged in conspiracies to fix prices and eliminate competition in the sale of milk, in violation of Section 1 of the Sherman Act, and seven counts charged it with selling milk below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act. Trial began before a jury on June 13, 1963, and on August 16, 1963, after nearly three days of deliberation, the jury returned verdicts of guilty on the first thirteen counts and not guilty on the last two counts (one under the Sherman Act and one under the Robinson-Patman Act).

Use of Grand Jury Transcript

The Government's proof at the trial consisted largely of testimony of dairy executives and distributors, including personnel of Sealtest and alleged co-conspirator concerns, as well as complaining dairy operators. In order to refresh their recollections on points admittedly critical to their case, Government counsel repeatedly used transcripts of their grand jury testimony during the direct testimony of five key prosecution witnesses and during cross-examination of Sealtest's Kansas City general manager and milk sales manager, both important defense witnesses. Petitioner moved to inspect the portions of the grand jury transcript so used, and all other portions concerning the same subject matter, but its motions were in all cases denied.[4] Thus, defense counsel were unable to further refresh the wit-

3. Petitioner was named a defendant in all counts, and Raymond J. Wise, its Vice President in charge of the Sealtest Central Division, was named a defendant in three counts. Various other concerns and persons were named as alleged co-conspirators but not as defendants.

4. See App. 77, 102-104, 120-21, 127, 157-58, 173, 174-75, 177-79.

nesses' recollections in order to explain or place in perspective the testimony elicited by the Government.[5]

Pertinent portions of the record are reprinted in Appendix C (App. 73-188) in order to illustrate the manner in which the refreshment procedure was carried out, the character of the testimony elicited in the course thereof, and petitioner's unsuccessful efforts to inspect the portions of the grand jury transcript so used and other portions relative to the same subject matter.

The Trial Judge's Instructions to the Jury Concerning Section 3 of the Robinson-Patman Act[6]

The Prior Decision of This Court. In an earlier appeal in this case, this Court sustained the unreasonably low prices clause of Section 3 of the Robinson-Patman Act against charges of unconstitutional vagueness, holding that, at least as to the conduct specifically challenged in this indictment, the statute gave adequate warning. *United States v. National Dairy Products Corporation*, 372 U.S. 29 (1963); App. 62-70.[7] In the course of its opinion, the Court stated with considerable care the heavy burden of proof which the Government would have to sustain, prescribing the elements of this burden from the indictment charges and in terms of the construction of the statute which the Court adopted to preserve its constitutionality.

What the prosecution must prove was stated as follows as the Court summarized its whole opinion: "sales made be-

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5. Having no access to the grand jury transcript, petitioner cannot know how severely its defense was prejudiced; however, it is demonstrable from the record that in at least two instances the prejudice was substantial (see n. 25 *infra*).

6. The trial judge's instructions concerning the Robinson-Patman charges and the governing law are set forth in Appendix D (App. 189-207).

7. Mr. Justice Black was joined by Mr. Justice Stewart and Mr. Justice Goldberg in dissent (App. 70-71).

low cost without legitimate commercial objective and with specific intent to destroy competition" (372 U.S. at 37; App. 69-70). The Court emphasized that the necessity of proving two "separate, though related, statutory elements", *i.e.*, the objective below-cost sale[8] and the subjective specific intent to destroy competition, made the law constitutional.[9]

Clearly, for petitioner to be convicted under Section 3 in this case with any lesser showing than that prescribed by the Court would involve no mere taking of liberties with statutory interpretation, but would tread directly upon unconstitutional territory. Yet, as demonstrated below, the trial court's instructions authorized conviction upon such a lesser showing as to each element of the offense charged.

The Evidence. Evidence under the Robinson-Patman counts revealed two basic situations: first, in the areas and time periods involved in Counts 4, 6, 8 and 10, Sealtest reduced its prices for two half gallons of milk in paper containers to levels which permitted them to be resold by distributors[10] at prices slightly above, or at the same prices,

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8. Noting petitioner's contention that "'below cost' is itself a vague and indefinite expression", the Court reserved the question of what *level* of cost would supply the standard, *i.e.*, fully distributed cost, "direct" cost, or some other cost level, because it said that this issue could not be decided "in the abstract", and it would be rendered "academic" if it developed at trial that petitioner sold below any of these cost levels (372 U.S. at 34-35; App. 67).

9. 372 U.S. at 35; App. 69-70. The Government had urged that if Congress had relied entirely on the predatory intent test to determine when low prices were unlawful, it would have run the serious risk of endangering price competition. Government Brief on Reargument, United States v. National Dairy Products Corporation (No. 18, Oct. Term, 1962) pp. 18, 20. (This brief hereinafter cited as "GBR . . . ")

10. Counts 3, 5, 7 and 9 alleged that these prices were set by conspiratorial agreements between Sealtest and the respective distributors, in violation of the Sherman Act.

as competitors' milk in glass gallon jugs; second, in July, 1958, Sealtest reduced prices on paper half gallons, meeting an equal price reduction by Fairmont-Country Club Dairy in the Kansas City area (Count 13),[11] and in the belief that it was following an equal price reduction by Foremost in the Paola area (Count 2).[12]

Sealtest made these price reductions believing that they were necessary in order to meet equally low, or lower, prices of competitors.[13] Its reduced prices in Kansas City (Count 13) were above its costs of production, *i.e.*, raw material, processing and packaging costs. Its other challenged prices were below production cost.

The Cost Instructions. Notwithstanding the emphasis placed by this Court on the indictment's specific sales below cost allegations, the trial judge charged the jury that it was its "ultimate duty to determine . . . whether the prices . . . were or were not unreasonably low" (App. 200). He did not define "cost" nor instruct the jury that the present indictment, as interpreted by the Government on the prior appeal,[14] charged petitioner with selling below its *costs of*

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11. A principal issue under Count 12 was whether or not this price reduction was part of an alleged conspiratorial two-step plan first to lower prices, then to raise them to higher levels, in violation of the Sherman Act.

12. Count 1 charged that the Paola distributor's resale prices were set by conspiracy with Sealtest, in violation of the Sherman Act.

13. Container for container and service for service, competition forces dairies in the same areas to charge the same prices for their milk. Petitioner contended and its evidence showed that where milk in paper cartons competed with milk in gallon jugs, carton milk had to be priced reasonably close to, or in some areas the same as, gallon jug milk, or its sales would decline.

14. The Government stated to this Court: "This is no borderline situation. Appellees are charged with selling at prices below their own costs of production" (GBR 38).

production, and he failed to instruct the jury to acquit if it found the challenged sales were above such cost.[15]

The Intent Instructions. Despite this Court's holding that "specific" intent to destroy competition must be proved, the trial judge charged in terms of "general" intent, *i.e.*, "the law presumes that persons must be held to have intended the necessary and direct consequences of their acts" (App. 201, n.), and they are chargeable for consequences reasonably to be anticipated (App. 201); he did not instruct the jury, as requested by petitioner, as to the more stringent requirements for proof of "specific" intent, *i.e.*, that "[t]he statute requires something more than merely intending normal consequences of an act: . . . proof of a specific intent to destroy competition."[16]

The "Meeting Competition" Instructions. On the meeting competition issue, the trial judge instructed that "sales below cost are not condemned if made in furtherance of a need to meet a lawful, equally low price of a competitor" (App. 193). He declined to charge, as requested by petitioner, that, to be "unreasonably low" under Section 3, prices must be shown to be "below cost and . . . not established . . . for any legitimate business purpose," or that defendant must be acquitted if its challenged sales were made "in good faith to meet . . . competition" (IX Pl. 1549, 1557). The court disparagingly commented that testimony to the effect that a "company's pricing policy was justified by meeting competition . . . [is] simply a conclusion on the part of the witness" (App. 193), and a "mechanical word

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15. Under Count 13, involving the greater Kansas City market, petitioner's challenged price of 27¢ per half-gallon was well above its cost of production, *viz.*, material, container and processing costs of 23.76¢, 25.25¢ and 25.17¢ during the indictment period (GX 1, pp. 1-698; DX 153; R. 5990).

16. See pp. 1546, 1552, 1553 of Volume IX of the pleading files sent up from the Court of Appeals. These files are hereinafter cited ".... Pl. ...."

formula" (App. 194). He instructed that the "defense of meeting competition" protected defendant (implying that it was *petitioner's* burden to prove) provided that the jury "found as a fact that Defendant National offered its reduced prices simply to meet the lawfully low price of a competitor and [it] found in fact that a lawfully low price of a competitor was in existence . . ." (App. 195). He further qualified this "defense," instructing the jury to decide if petitioner "in fact undercut" gallon jug prices by pricing its half-gallons "at the same price . . . or . . . so close to the . . . gallon jug as to be considered below what the Government contends was an existing differential under normal . . . conditions" (App. 197-98), and he confused the issue by comparing the milk business to the gasoline business where, he asserted, there is a "known differential" (App. 197).[17]

REASONS FOR GRANTING THE WRIT

I. The Rule Followed by the Courts Below in Denying Defense Motions to Inspect Portions of Grand Jury Transcripts Utilized by the Prosecution for Witness Refreshment, and Other Portions on the Same Subjects, Is Contrary to Prior Opinions of This Court and Other Appeals Courts, and Deprived Petitioner of a Fair Trial

The trial judge's refusal to grant defense motions for

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17. Petitioner's requested instructions concerning "cost," "specific intent" and "meeting competition" (IX Pl. 1546, 1548, 1550-55, 1557, 1559) were refused by the trial court in favor of his "own instruction" in a pre-instruction conference (see R. 6744). Following the charge to the jury, the trial judge indicated generally that he wanted only "additional objections" not previously ruled upon (R. 7203). Petitioner thereafter made objections to the instructions given on "cost," "specific intent," "lawful" competitive price "in fact . . . in existence," the belittling references to "mechanical word formulas," and the confusing references to the "established differential" in the gasoline business (R. 7204-05, 7225-32, 7235-36, 7238), and these objections were overruled (R. 7251-53).

limited disclosure of grand jury transcripts utilized by the Government at the trial raises an important question in the administration of criminal justice not confined to anti-trust cases.

The Government in this case lifted the veil of grand jury secrecy to refresh the recollection of its own witnesses on direct examination, as well as defense witnesses on cross-examination, by reading in open court from their prior grand jury testimony concerning points which were critical in proving the crimes charged.[18] Defense motions to inspect portions of the grand jury transcript so used, and other portions covering the same subject matter, were uniformly denied, contrary to the rule stated by this Court that when grand jury transcripts are so used, limited disclosure should be allowed.[19]

In *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), this Court, in the course of holding that a defendant in a criminal case does not have an absolute right to inspect portions of a prosecution witness' prior grand jury testimony—no use having been made of such prior testimony at the trial—stated (360 U.S. at 399):

> "As recently as last Term we characterized cases where grand jury minutes are used 'to impeach a witness, to refresh his recollection, to test his credibility and the like' as instances of 'particularized need where the secrecy of the proceedings is lifted discretely

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18. See p. 14 *infra*.

19. The trial judge stated initially that he was "not at all sure that under the Supreme Court cases . . . to permit examination by defense counsel might not actually be error" (R. 436-37) and, after consistently denying defense motions for limited disclosure, he reiterated in the closing days of trial: "[M]y view of the law is that I can't do that" (App. 179).

and limitedly.' *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958)."[20]

In the dissenting opinion, Mr. Justice Brennan, joined by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas, also observed (360 U.S. at 404) that ". . . when the Government uses grand jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony in those minutes." Hence, this Court was unanimous that prosecution use of grand jury transcript at trial calls for limited disclosure to the defense.[21]

In its opinion in the case at bar, the Court of Appeals held that even where grand jury transcript was used to refresh witnesses' recollections, if it was "not shown to the witnesses and . . . an appropriate procedure [was] . . . followed to prevent its improper use" (350 F.2d at 331; App. 19),[22] no rule requires disclosure; a defendant still has the burden of showing "a compelling necessity," one which "outweighs any countervailing policy" (350 F.2d at 331; App. 18).

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20. In the *Procter & Gamble* case, this Court ruled that *wholesale* discovery of testimony given in an earlier grand jury investigation would not be made under Rule 34 in a civil antitrust case in the absence of a "much more particularized . . . showing of need" than had been made. However, the Court emphasized (356 U.S. at 683): "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly."

21. The four dissenting justices in *Pittsburgh Plate Glass* regarded the trial judge's refusal to disclose the requested transcript as reversible error, even though Government counsel *had not used* the transcript in interrogating the witness.

22. The procedure utilized was for the prosecution to mark in red all portions of a witness' grand jury testimony it anticipated using for refreshment purposes, and in black all other portions covering the same subject matter, and to submit the marked transcript to the trial judge, who would then rule on its use and follow the reading to the witness (see App. 77).

This is entirely inconsistent with the principle stated in *Pittsburgh Plate Glass, supra,* that Government "use" of grand jury transcript to refresh witnesses' recollections establishes "particularized need" calling for limited disclosure to the defense. Moreover, the rule stated by the Court of Appeals is contrary to the views expressed by other Courts of Appeals in two respects: first, other Courts of Appeals have recognized that once the grand jury is discharged, no heavy burden rests upon a defendant to prove compelling need;[23] second, a defendant's particularized need of inspection is not "secured by the trial judge's going over the record for himself and selecting so much as he thinks relevant. The [defendant] must be allowed an inspection for himself." *United States* v. *Cotter,* 60 F.2d 689, 692 (2d Cir. 1932). Or, as stated in the minority opinion in *Pittsburgh Plate Glass:* ". . . only the defense is adequately equipped to determine the effective use . . ." of refreshment material (360 U.S. at 409-10).[24]

It is thus no answer to suggest, as did the Court of Appeals (350 F.2d 330-31; App. 17-19), that the trial judge's review of the grand jury transcript protected petitioner's rights. Although petitioner cannot know the full extent of the prejudice it suffered by reason of the trial judge's denial of its motions for limited disclosure, two examples,

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23. See United States v. Consolidated Laundries Corp., 159 F.Supp. 860, 862, n. 5 (S.D.N.Y. 1958), cited with approval, 291 F.2d 563, 574 (2d Cir. 1961); Continental Baking Co. v. United States, 281 F.2d 137, 147-48 (6th Cir. 1960); see also Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233, 241 (5th Cir. 1963); U.S. Industries, Inc. v. United States District Court, 345 F.2d 18, 21-22 (9th Cir. 1965), *cert. denied,* 34 U.S.L. WEEK 3118 (U.S. Oct. 11, 1965).

24. The quoted language is from Jencks v. United States, 353 U.S. 657, 668 (1957).

described in the margin,[25] vividly demonstrate the soundness of the principle stated by Mr. Justice Brennan and by Judge Hand (*supra* p. 12) that only defense counsel is equipped to make the necessary inspection; the trial judge cannot be expected to review the relevant portions of the grand jury transcript during trial and grasp the full signi-

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25. Under Count 12 the Government tried to establish that GX 181-A, a document of questionable origin bearing two price lists and a discount schedule, set forth the alleged conspiratorial plan to lower the price to 25¢, then to raise it to 33¢. During direct examination of Augenstein, an alleged co-conspirator, Government counsel sought to prove he was informed that Sealtest was considering reducing its price to 25¢ per half-gallon. Augenstein testified that the figure was 27¢. Government counsel then read from Augenstein's grand jury transcript to refresh his recollection that he had previously testified 24¢ or 25¢, but Augenstein reiterated that his best recollection was 27¢. This clearly tended to discredit Augenstein; yet the trial judge, having before him a marked transcript showing that Augenstein had testified to the 27¢ figure at another session of the grand jury, made no mention of this fact (App. 150-51). Earlier reference by Government counsel to this inconsistency in Augenstein's testimony, which the record shows defense counsel did not then understand (App. 149) could not relieve the court under the very rules it established of reading to the witness the additional 27¢ testimony, or at least commenting upon it to the jury.

A second example occurred during the testimony of Baird, Kansas City milk sales manager for Sealtest, a major defense witness on all counts. He had testified on direct that gallon jugs were a strong competitive factor during the years and in the markets in question (R. 5181-84, 5244-57, 5268-81, 5284-85, 5451). On cross-examination, Government counsel first obtained confirmation that the witness had "always been of the opinion that these jug operations . . . were detrimental to [Sealtest's] business" (App. 171), then read a portion of Baird's grand jury testimony, allegedly for refreshment purposes, that "gallon jug operators were just a small factor fight at that time." Baird asked: "At what time was this being discussed?" Government counsel refused to answer, and the trial court, previously having denied the defense's limited disclosure request, denied a motion to strike (App. 173-74).

ficance of what he is reading in terms of the matters which should be developed in fairness to the defense.

In reaching its decision in the case at bar, the Appeals Court paraphased certain observations made by this Court in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940), but it clearly misinterpreted and misapplied the rule of that case. There, the Court's decision (upholding denial by the trial court of defense motions for disclosure) turned on the fact that by the use of the grand jury transcript, witnesses were refreshed only on "minor facts" and the testimony "was either cumulative or dealt only with the minutiae of the conspiracy" (*id.* at 235). Quite to the contrary in the present case, in memoranda filed with the trial judge during the trial, the Government itself characterized the testimony in the grand jury transcript it sought to use as involving "salient points" in the prosecution's case (VIII Pl. 1194-95). And, defending its use of the grand jury transcript in the Court of Appeals, Government counsel pointed out:

> "*To prove the crimes charged* in the indictment, the government was obliged to rely in large measure upon the testimony of persons who were dependent for their livelihood upon the appellant . . . and employees of the co-conspirator corporations. Certainly, it was not in the self-interest of such persons to be anxious to retain a recollection of *critical, incriminating facts,* and indeed their natural tendency to forget because of the more than four years that elapsed . . . would naturally be accelerated . . . . Under these circumstances the government naturally turned to the grand jury transcript to . . . jog the faded memories. . . ."[26]

Thus the refreshment procedure admittedly dealt with highly important matters on issues critical to the prosecution. The testimony on these critical issues was important

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26. Brief for Appellee, National Dairy Products Corporation v. United States, 8th Cir., No. 17734 (March 1965), p. 80 (emphasis supplied).

to the defense in the same proportion as it was important to the prosecution. The Government was permitted to refresh seven witnesses on salient points by using selected excerpts from their grand jury testimony supposedly favorable to the prosecution. The defendant's right to a fair trial demanded that defense counsel be given access to all portions of the witnesses' grand jury testimony on the same subject matter so that defense counsel could attempt more extended refreshment of the witnesses' recollections by using those related portions of the transcript which Government counsel did not choose to call to the witnesses' attention. Fair play required no less. There could hardly be a clearer case of the "particularized need" which this Court unanimously recognized in *Pittsburgh Plate Glass* calls for a limited disclosure such as defendant here requested and was denied.

The distinction made by the Court of Appeals (see 350 F. 2d at 331; App. 19), which would permit inspection of grand jury transcripts which were *shown* to a witness, or which were used for impeachment, or as substantive evidence, but deny disclosure where the prior testimony was *read* to the witness for the purpose of refreshing recollection, was, in the case at bar, a distinction with no meaningful difference. Obviously, the defense's need to inspect the full testimony of what a witness said on a given subject is precisely the same whether selected excerpts are read to him or shown to him, and denial of inspection is equally prejudicial in the one case as in the other. To illustrate: Frequently, although witnesses stated that their recollections were not refreshed by hearing excerpts of their grand jury testimony read, they were prevailed upon to "adopt" their prior statements, or to admit that their memories were much fresher and more reliable at the time of the earlier testimony.[27] It is farcical to suggest in such event that the defense has any real right of cross-examination

27. See, *e.g.*, Flanagan, App. 89, 90; Crimmins, App. 107-08; Gilmore, App. 117-118, 120-23; Augenstein, App. 129, 142, 153, 156; Gardner, App. 162, 166, 170.

as to matters so adduced, when it is denied the right to see in context and in full what the witness testified on the subject previously, and this is no less true whether the grand jury testimony selected by the Government is read or shown to the witness.[28]

The ultimate question is whether it is "fair administration of criminal justice" for the Government to use the grand jury transcript at trial to help it obtain a conviction, and at the same time to "insist upon grand jury secrecy even when the possible prejudice to the accused in a criminal case is crystal clear and none of the reasons justifying secrecy is present."[29] It is well known that Government

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28. The Court of Appeals apparently misunderstood petitioner's position for it stated that petitioner "contends that the [trial] court permitted Government counsel to use the grand jury testimony for impeachment purposes and as substantial evidence and, therefore, that the court erred in denying its motion to inspect the transcript" (350 F.2d at 331; App. 18). In fact, petitioner had urged there as here that, when the grand jury minutes were used *for refreshment,* the requested limited disclosure should have been granted. The line between refreshment and impeachment is a fine one, and here, as the court noted in Continental Baking Co. v. United States, 281 F. 2d 137, 146-47 (6th Cir. 1960), with respect to the same type of refreshment procedure by the same Government attorneys: "Although the stated purpose . . . was to refresh their recollection, at times the *effect* was, in practical application, very close to impeachment" (emphasis supplied); *cf.* App. 76 and 78, 92-94, 99-101, 135-36, 152-53, 169, 179-80; n. 25, *supra.* The fact that denial of limited disclosure is as prejudicial in the case of refreshment as impeachment fully supports the proposition indicated in *Pittsburgh Plate Glass,* i.e., that *any* Government use at trial calls for limited inspection by the defense.

29. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 403 (1959) (dissenting opinion). None of the policy considerations behind the grand jury secrecy rule supports the trial court's denial of the limited inspection requested in this case. As Judge Hand stated in United States v. Cotter, 60 F. 2d 689, 692 (2d Cir. 1932), when "the prosecution chooses to open [the grand jury minutes], the time for secrecy has passed; fair dealing requires that the other side shall inspect them freely." The dissenting opinion in *Pittsburgh Plate Glass* cited the *Cotter* case (*id.* at 404).

attorneys use grand jury minutes in preparing cases for trial,[30] and the record shows that they did so in the case at bar.[31] To permit them also to select and use at trial portions of witnesses' grand jury testimony helpful to their contentions, and suppress related portions under a sterile rule of grand jury secrecy, is rank injustice.[32] Unless this Court shall act, the opinion of the Court of Appeals will stand as a precedent for just such an unfair procedure in all future criminal cases.

II. This Case Raises Important Questions Under Section 3 of the Robinson-Patman Act Because Both Lower Courts Misapplied This Court's Prior Opinion in This Case, Thereby Permitting Petitioner to Be Convicted Under Standards Falling Below the Constitutional Requirements Established by the Court for This Case

On the trial, every key element of this Court's carefully delineated constitutional guideline for this case was misapplied (see pp. 5-6 *supra*). The results of these errors are three-fold. First, the petitioner has been deprived of the right to be tried according to the law of this case established by this Court in the prior appeal. Second, the interpretations adopted by the lower courts have raised serious legal issues on all three points which are basic to the ad-

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30. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 404 (1959) (dissenting opinion).

31. In at least one instance, after such preparatory refreshment, the witness was refreshed again on the stand, and finally prevailed upon to adopt his prior testimony. See App. 113-18.

32. The result of denying the limited disclosure requested by the defense may have been to suppress material evidence favorable to petitioner, amounting to denial of due process of law. See United States v. Consolidated Laundries Corp., 291 F. 2d 563 (2d Cir. 1961); United States v. LaVallee, 344 F. 2d 313, 315 (2d Cir. 1965); *cf.*, Brady v. Maryland, 373 U.S. 83, 87 (1963); Berger v. United States, 295 U.S. 78, 88 (1935); Griffin v. United States, 183 F. 2d 990 (D.C. Cir. 1950).

ministration of this law, and obedience to it. Third, by departing from this Court's standards for this case, the lower courts have carried the law into an unconstitutional application.

A. Notwithstanding the Charge that Petitioner Sold Below Its Production Cost, the Trial Judge Failed to Define "Cost," and Although the Question Was Reserved by This Court, He Authorized the Jury to Find That Prices Below "Fully Distributed" Cost Are "Unreasonably Low"

In spite of the emphasis which this Court had placed upon the "specificity of the violations charged in the indictment here,"[33] the trial judge, in charging the jury, delegated to it a broad discretion to draw its own meaning from the statutory phrase "unreasonably low price," and to make its own determination of the importance and meaning of the indictment charges of sales "below cost." He quoted the vague language of the statute, paraphrased the indictment charges that petitioner sold at unreasonably low prices and subsidized price wars by selling below cost, described in general terms Congress' purposes in passing Section 3, gave examples of "pricing conduct" that would not violate that section, and wound up by instructing that it was the jury's "ultimate duty to determine . . . whether the prices at which sales were made were or were not unreasonably low" (App. 190-200). He never instructed that the gist of the charge against petitioner was selling below production cost and he never instructed, either expressly or in comparable terms, that it must be acquitted if its prices were "on any acceptable accounting theory, above cost" or above "direct" cost, as petitioner had requested.[34]

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33. 372 U.S. at 36; App. 68.

34. See IX Pl. 1550-51. This was not an "abstract" question or "academic" issue, but exactly the point upon which this Court had reserved judgment (see n.8 *supra*); the challenged price under Count 13 was 27¢ per half-gallon, well above petitioner's "costs of production" (see n.15 *supra*).

In the Court of Appeals, the Government admitted that "the definition of the term 'cost' is a question of first impression"[35] and, faced with the confusing hodge-podge of instructions just described, it was forced to confess error on the part of the trial court in failing to furnish the jury with a standard on this critical aspect of the case. Government counsel stated: *"We believe the [trial] court erred in treating the definition of 'below cost' as an issue of fact for the jury to decide rather than an issue of law. . . ."*[36] Ignoring the fact that the trial judge's imprecise instructions in fact permitted the jury to pick some standard which may have been completely unacceptable under this Court's prior decision, the Government offered the astounding argument that the error favored the defense since *"'cost' means fully distributed costs,"* and the instructions *"permitt[ed] the jury to choose a standard* under which conviction would be more difficult than the standard embodied in the statute."[37] The argument is astounding because it amounts to a complete repudiation of the Government's previous representation to this Court that "below cost" in the case at bar means below petitioner's *"own costs of production"*;[38] it is doubly astounding because, just before making this argument, the Government had recognized that this Court had reserved for later *judicial* decision the question of what level of cost was meant by "below cost" (which, of course, is not "embodied in the statute"), and that this was a case of first impression.

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35. Brief for Appellee, n.26 *supra*, p. 118 (quoting this Court's language reserving the question of "[w]hether 'below cost' refers to 'direct' or 'fully distributed' cost or some other level of cost computation"—372 U.S. at 34-35; App. 67).

36. *Id.* at 119 (emphasis supplied).

37. *Ibid.* (emphasis supplied).

38. GBR 38; see n.14 *supra* (emphasis supplied). The Government argument is also a far cry from its prior position in this Court that particular accounting methods are of no significance, and that a seller should be acquitted if he even *believed* he was not selling at a loss (GBR 30, 40-41).

In its opinion, the Court of Appeals minimized the issue, holding that the unreasonably low price requirement of Section 3 is satisfied by a showing of "sales at prices below *some* level of cost,"[39] but further stating:

> "[T]he predatory or competitive nature of the seller's price, rather than theoretical cost considerations, is the real index of its legality. The question resolves itself into one of intent and purpose, not a choice of accounting methods."[40]

In holding that the "question resolves itself into one of intent and purpose," the Court of Appeals in effect substituted a single, almost entirely subjective standard for the two separate (objective and subjective) elements of proof which this Court held were essential to avoid unconstitutional vagueness, *i.e.*, (1) "sales made below cost without legitimate commercial objective" and (2) "specific intent to destroy competition" (372 U.S. at 37; App. 69-70). The result is a completely circular, boot-strap rationale: under the Appeals Court's decision, the "real index of legality" of a seller's low price is intent. But (as more fully discussed below—see pp. 21-23 *infra*), a predatory intent under the lower courts' decisions can be presumed from the fact of a seller's low price and its effect upon competitors. Thus is eliminated any objective standard for the guidance of either businessmen or juries.

Not only do the lower court decisions raise serious questions concerning the administration of Section 3, but, owing to the deterrent effect they will have upon vigorous price

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39. 350 F.2d at 330; App. 16 (emphasis supplied).

40. *Ibid.* In ruling thereafter that "it was a fact question, properly submitted to the jury, whether sales below *fully distributed* costs were 'unreasonably low' . . . " the Court of Appeals made the determination—which this Court had expressly refrained from making (see n.8 *supra*)—that failure to make a profit is prima facie proof of selling at "unreasonably low" prices (350 F.2d at 336; App. 29; emphasis in original).

competition if permitted to stand, they are incompatible with basic antitrust policy. If mere failure to make a profit establishes an important element of a criminal offense, businessmen naturally will be deterred from aggressive price competition. They will hesitate to innovate. Certainly, they will fear to reduce prices in order "to build up volume to the point where unit cost [is] reduced below the unit price."[41]

B. The Trial Judge's Instructions Authorized Conviction Upon a Presumed Intent Rather Than Requiring a Finding of "Specific" Intent to Destroy Competition, Contrary to This Court's Prior Holding

Notwithstanding the fact that, on the constitutionality appeal, the Government urged,[42] and this Court held, that the requirement for proof of a "specific" intent to destroy competition saved Section 3 from being unconstitutionally vague (372 U.S. at 35, 37, App. 68-70), both courts below have treated as sufficient a mere "general" intent, allowed

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41. On the prior appeal the Government recognized this as a legitimate reason for selling below cost (GBR 10). Particularly in close margin industries, businessmen will be forced to "play it safe" simply because they do not have definitive unit cost figures. Unit costs cannot be accurately known in advance of sales, for, as the Government conceded (GBR 30-31), these vary with the volume sold. Even after sales are completed, unit cost data is elusive; it "apparently cannot be obtained from ordinary business records." See Automatic Canteen Co. v. FTC, 346 U.S. 61, 68 (1953). Indeed, the Government, opposing a proposed federal sales-below-cost statute, recognized that "cost of manufacturing, of packaging, of selling, not to mention overhead cost, are all imprecise terms. . . ." These points, and other difficulties in identifying and defining the term "cost" are discussed in Brief for Appellees on Reargument, United States v. National Dairy Products Corporation, No. 18, Oct. Term, 1962, pp. 43-54.

42. "The requirement of a specific, evil intent immediately eliminates the danger that anyone will be convicted of crime merely because his prices are found too low by a court or jury" (GBR 23).

to be presumed by the jury from mere selling below cost and adverse effects upon some competitors.

It is no answer to say, as did the Court of Appeals, that the "jury was . . . required to make 'a finding of predatory intent beyond a reasonable doubt . . .'" (350 F.2d at 335; App. 28), because, in instructing the jury *how it should determine intent*, the trial judge instructed in terms of "general intent." He instructed that "the law presumes that persons must be held to have intended the necessary and direct consequences of their acts" (App. 201, n.), and gave the illustration that a workman casting a beam off a building in a city and causing harm to a person below "is dealt with as if he foresaw it, whether he does so in fact or not" (App. 201).[43] Nowhere did he charge the jury as to the more stringent requirements for proof of "specific" intent, or instruct that it could not be presumed from the fact or the consequences of petitioner's challenged sales.[44]

Although proof of "general" intent is sufficient to establish a Sherman Act violation[45] (except attempt to monopolize), Section 3 of the Robinson-Patman Act can be rationalized with the national policy favoring vigorous price competition only if its prohibition is confined to low prices shown to have been adopted for the planned purpose of

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43. The trial judge further minimized the intent requirement when, in paraphrasing the charges in the distributor counts that petitioner financed price wars by "intentionally selling milk . . . below . . . cost," he repeatedly omitted the word "intentionally" (App. 190, 204, 205, 206, 207; R. 7195). This Court had noted the "specificity" of this charge. 372 U.S. 29, 31, 36 (1963); App. 64, 68.

44. The trial judge declined to give petitioner's proposed charge on specific intent (see p. 8 *supra*); nor did he charge that "[t]he intent required by Section 3 is not merely an intent to do the prohibited act; it is a specific intent to 'destro[y] competition or eliminat[e] a competitor'", as the Government asserted to this Court on the prior appeal (GBR 24).

45. United States v. Patton, 226 U.S. 525, 543 (1913).

destroying competition.[46] Otherwise— as in the case at bar—a "general" intent instruction authorizes the jury to impute the requisite evil motive to a seller from the facts that he knowingly dropped his prices and competitors were injured. He is dealt with not only "as if he foresaw" such injury—in the language of the trial judge's example—but as if this were his objective in lowering his prices.

Under our system of law, a low price seller should no more be convicted under Section 3 without proof of specific intent to destroy competition than should a large company be convicted of attempting to monopolize in violation of Section 2 of the Sherman Act without proof of specific intent so to do (*United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945)),[47] or a taker of property be convicted of theft without a showing of specific intent to steal (*Morissette* v. *United States*, 342 U. S. 246, 264 (1952)). The general intent instructions of the trial judge deprived petitioner of a vital safeguard to its rights and, if permitted to stand as a precedent, will not only weaken the rights of those criminally tried in the future but will threaten basic price competition—"the central nervous system of the economy" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 (1940)).

C. In His Jury Instructions, the Trial Judge Set Forth Incorrect Standards and an Erroneous Burden of Proof on the Issue of "Meeting Competition"

On the prior appeal, this Court stated expressly that below-cost sales made for a "legitimate commercial objective" such as to meet "a lawful, equally low price of a competitor" would "neither be 'unreasonably low' nor made

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46. On the prior appeal, the Government argued that this was Congress' rationale of the statute. See GBR 18.

47. This portion of the *Alcoa* decision was cited with approval in United States v. Griffith, 334 U.S. 100, 106 (1948).

with predatory intent."[48] Since the issues of "unreasonably low" and "predatory intent" are indispensable elements in the alleged crime and, therefore, part of the Government's burden of proof, the Court, of course, did not say that defendant would have the burden to establish meeting competition, or any other facts, to *negative* them.

This Court did, however, define the charge to be proved under Section 3 as "sales made below cost without legitimate commercial objective and with specific intent to destroy competition" (372 U.S. at 37; App. 69-70). At the very least, this holding means that if evidence should develop — as it did here in the Government's own case[49] — that the allegedly unlawful low-price sales were made by the seller in order to meet competition, it was the Government's burden to overcome that evidence.[50]

Notwithstanding this background, the trial judge placed upon petitioner the burden of establishing a "good faith

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48. 372 U. S. at 36-37; App. 69. The Court also indicated that a below-cost sale was not unreasonably low if "mitigated by some acceptable business exigency" (*id.* at 33; App. 66).

49. For example, evidence under Count 2 showed that before petitioner reduced prices to its Paola distributor, it had been informed that a major competitor had reduced its prices in the area, and a newspaper advertisement by a food chain customer served by that competitor tended to confirm this report (R. 3371-91, 3578, 3604-12).

50. Arguing the constitutionality question, the Government clearly indicated that in order to show that a price was "unreasonably low" it would have to negate "normal business considerations" (GBR 20); it took the position that an "unreasonably low" price is one that "has no rational foundation in the seller's costs, or in market conditions or other business exigencies . . ." (GBR 19; see also GBR 30), asserting that "questions of degree would be resolved in favor of the seller. He would be acquitted unless his prices, made with a predatory intent, fell outside the range of what an ordinary businessman . . . would consider reasonable under the same conditions" (GBR 21).

meeting competition defense" (App. 195). His meeting competition instructions obviously were adapted from the affirmative defense contained in Section 2(b) of the Clayton Act as amended—as if this were not a criminal case under the unreasonably low price provisions of Section 3 of the Robinson-Patman Act but, rather, a civil case under the price discrimination provisions of Section 2(a) of the amended Clayton Act. This was totally erroneous, for it is only "at any hearing . . . under this section", and only upon a "person charged with a violation of this section" (*i.e.*, Section 2, the civil section) that Section 2(b) places the burden of showing justification upon a seller.[51]

Moreover, in instructing that the competitive price being met must be "lawful" and "in fact . . . in existence,"[52] the trial judge attached conditions even stricter than those applicable to the Section 2(b) proviso in civil cases. A seller claiming the civil defense under Section 2(b) perhaps must show that he reasonably *believed* that the price he met was lawful,[53] but no case holds that the actual "lawful-

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51. See App. 72.

52. See App. 193, 194, 195, 198, 200. Although this Court had referred to the "need to meet a lawful, equally low price of a competitor" (372 U.S. at 36-37; App. 69), this clearly was given as an *example* of a "legitimate commercial objective" and was not intended to establish a standard for every meeting competition question.

53. See ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 181 (1955); Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956). The Federal Trade Commission, applying the meeting competition proviso in two recent civil cases, has not applied the "lawfulness" test. See American Oil Co., TRADE REG. REP. (FTC Complaints and Orders, 1961-1963) ¶ 15,961 at 20,789 (1962); Continental Baking Co., (FTC Complaints and Orders, 1963-1965) ¶ 16,720 at 21,645 (1963). Representative Patman has rejected the notion that any lawfulness qualification was intended to apply to the § 2(b) proviso. See ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 45 (1964 Supp.).

ness" of a competitor's price must be proved in order to establish even a civil meeting competition defense,[54] and the proposition that Section 2(b) requires a seller to show that he "in fact" met a competitive price was specifically rejected by this Court in *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759 (1945).

The trial judge added to the already heavy burden he had placed upon petitioner by cautioning the jury that testimony claiming "meeting competition" as justification was "simply a conclusion . . . of the witness" and a "mechanical word formula,"[55] and he confusingly compared the gasoline business (where there was a known differential between "name brand" gasolines and others) to the milk business (where there was no established differential between milk in different containers), warning the jury that even if petitioner were selling milk in paper cartons at higher prices than milk in gallon jugs, it might be undercutting, rather than meeting competition, if the jury found that such prices were below some "normal" differential.[56] Moreover, various irrelevant references in the instructions (*e.g.*, to an inapplicable decision of this Court and to certain Congressional reports—see App. 194-96) also tended to denigrate the whole subject of meeting competition.

The Court of Appeals opinion upholding the trial judge's instructions did not mention petitioner's contentions (which

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54. A seller trying in good faith to meet the equally low price of a competitor can no more be assured that the price being met is lawful than a buyer can know that a price he is offered is cost justified. *Cf.*, Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

55. App. 193, 194.

56. App. 197-98. Arguing that there *ought to be* some differential, the Government conceded in the Court of Appeals that "there was not unanimity as to what the differential should be. . . ." Brief for Appellee, n.26 *supra*, p. 130, n.110.

were strongly opposed by the Government[57]) on the "meeting competition" question, and the serious issues raised thereby remain unresolved.

As a criminal statute, Section 3 must be strictly construed.[58] Overall, the trial court's Robinson-Patman instructions, approved by the Court of Appeals, not only do violence to this principle but raise serious and novel questions concerning the administration and unconstitutional application of Section 3.

Unless this Court shall act, the rules that a seller is suspect if he fails to make a net profit; that a jury, looking at competitive effects, may presume that a seller has anticompetitive motives; and that a seller may have to prove his innocence under strained and unrealistic standards governing "meeting competition," cannot help but deter price competition and thereby contravene basic antitrust policy. See *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 63, 73-74 (1953); *Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 4 (1958).

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57. Brief for Appellee, n.26 *supra*, pp. 122-29. Even if the Government were correct that a "legitimate commercial objective" or "meeting competition" are affirmative defenses, the trial judge's instructions still were erroneous, for the only standard of proof submitted to the jury was proof beyond a reasonable doubt; the court erred in failing to charge that a mere "preponderance of the evidence" was sufficient to establish such defenses. Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

58. See United States v. Boston & Maine R.R., 380 U.S. 157 (1965).

CONCLUSION

For the reasons hereinabove set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 22, 1965

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,734

National Dairy Products Corporation,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[August 27, 1965.]

[350 F. 2d 321]

Before JOHNSEN, VOGEL and MATTHES, Circuit Judges.

MATTHES, Circuit Judge.

National Dairy Products Corporation (National or appellant) has appealed from the judgment of conviction on seven counts of an indictment charging a conspiracy to fix prices and eliminate competition in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and on six counts charging sales of milk at unreasonably low prices for the pur-

pose of destroying competition in violation of § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a.[1]

The indictment alleged violations in seven different market areas. A Sherman Act violation and a Robinson-Patman Act violation were alleged to have occurred in each market area. Thus, Counts 1 and 2 related to Paola-Osawatomie, Kansas; Counts 3 and 4 to Sedalia, Missouri; 5 and 6 to Lexington, Missouri; 7 and 8 to Mexico, Missouri; 9 and 10 to Glasgow, Missouri; 11, 12 and 13 to Greater Kansas City; 14 and 15 to Butler, Missouri; Raymond J. Wise, a vice-president and director of National, was named as a defendant in Counts 11, 12 and 13.[2] The trial commenced on June 13, 1963, and proceeded without unnecessary interruption until August 16, 1963. Ninety-seven witnesses testified, over 7,000 pages of transcript were produced and more than 600 exhibits were introduced. The jury, after nearly three days of deliberation, returned verdicts of guilty on Counts 1 through 13 and verdicts of not guilty on Counts 14 and 15.

Post-trial motions for judgment notwithstanding the

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1. The indictment returned on September 16, 1959, contained 15 counts. Two intermediate appeals were taken by the United States from orders of the United States District Court (the late R. Jasper Smith). In *United States* v. *Wise*, 370 U.S. 405 (1962), the Supreme Court reversed an order of the district court which had dismissed Wise, and held that the Sherman Act imposes personal liability upon corporate officials for acts done in violation of the Act. In *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963) the court reversed the district court order which had dismissed the Robinson-Patman Act counts, and held that § 3 of the Robinson-Patman Act was not unconstitutionally vague as applied under the indictment.

2. Counts 1, 3, 5, 7, 9, 11, 12 and 14 alleged Sherman Act violations; Counts 2, 4, 6, 8, 10, 13 and 15 alleged Robinson-Patman Act violations.

verdict and, in the alternative, for a new trial, were filed by both National and Wise. The motions were competently briefed by counsel. After oral argument the motions were denied. The court's supporting opinion is reported at 231 F.Supp. 663 (1964).

The Court (Honorable John W. Oliver) then fined National $50,000 (the maximum) for each of the seven Sherman Act violations, and $5,000 (the maximum) for each of the six Robinson-Patman Act violations, a total of $380,000. Wise was fined $25,000 on each of Counts 11 and 12 and $2,500 on Count 13, a total of $52,500. Wise also received a suspended jail sentence of three months on each of Counts 11, 12 and 13, to run concurrently.[3] Both National and Wise appealed but, later, Wise filed a motion to dismiss his appeal, which we granted on November 30, 1964.

Appellant advances six basic contentions relating to (1) the procedure for handling of grand jury minutes and appellant's motion to inspect portions used; (2) the court's instructions to the jury; (3) the court's attitude; (4) rulings on evidence; (5) the court's rejection of the circumstantial evidence rule and (6) the insufficiency of the evidence to make a jury case on Counts 1 and 2, relating to the Paola-Osawatomie market, and Counts 11 and 13, relating to the Greater Kansas City area market. Numerous subsidiary claims of error are presented in support of each basic contention.

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3. Post-trial proceedings held on June 22, 1964, in connection with imposition of the fines and sentence, show that on February 23, 1962, following entry of a plea of nolo contendere in the United States District Court of Maryland, National was fined a total of $12,500 for two Sherman Act violations and that on June 15, 1964, following a plea of nolo contendere in the United States District Court of Massachusetts, National was fined $25,000 for a Sherman Act violation.

Before examining, considering and disposing of appellant's contentions, a resume of pertinent facts, ascertained from undisputed evidence, is in order.

National, a large company, is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States. Its products are sold under several trade names, including "Sealtest" and "Kraft." During the period of time covered by the indictment, defendant Wise had been an officer and director of National in charge of its Sealtest Central Division, which included the midwestern states.

National operates a processing plant in Kansas City, Missouri, and has been in competition with other national dairies and local small dairies, both in the Greater Kansas City area (which consists of Jackson and Clay Counties, Missouri, and Wyandotte and Johnson Counties, Kansas) and in a number of small outlying cities and towns in Missouri and Kansas. In the Greater Kansas City market, National, through its employees, primarily distributes its products directly to stores and home delivery customers. In the other cities and towns in Missouri and Kansas it usually sells its milk in paper cartons to independent distributors, who in turn resell the milk to their own customers.

The Government, of course, urges that the jury's verdicts on all counts were responsive to, and fully supported by, the evidence. Although appellant challenged the legal sufficiency of the evidence as to all counts by filing timely motions for judgment of acquittal and post-trial motion for judgment notwithstanding the verdict in the district court, here appellant, in effect, concedes a submissible case was made as to all counts except 1 and 2, and 11 and 13.

However, appellant does contend that the trial court

applied an erroneous standard in evaluating the evidence under all thirteen counts (and particularly under Count 11) of which appellant was found guilty. Arguing that the evidence was wholly circumstantial—not direct—appellant seeks application here, as it did below, of the circumstantial evidence rule under which "[u]nless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused." *Pevely Dairy Co.* v. *United States,* 178 F.2d 363, 370 (8 Cir. 1949), citing *Salinger* v. *United States,* 23 F.2d 48, 52 (8 Cir. 1927).

In denying appellant's motion for judgment of acquittal at the close of the Government's case relating to Counts 11, 12 and 13, the trial court was of the view that this court's opinion in the *Pevely Dairy* case, supra, did not establish a "substantive rule of law" concerning the circumstantial evidence rule. Rather, the court determined that it should only "consider whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to become persuaded of guilt."[4]

The so-called "circumstantial evidence" rule "is applicable only where the evidence is wholly circumstantial and if there is any direct evidence in the case for the government which would be sufficient if believed by the jury to show defendant's guilt, then the rule as to circumstantial

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4. The trial judge was attempting to follow the rule of *Holland* v. *United States,* 348 U.S. 121, 139-140 (1954). In overruling the motion for a directed verdict, he indicated to counsel that the jury should be given an instruction on circumstantial evidence. The court did instruct on circumstantial evidence and no exception was taken to that instruction, nor complaint made of it on this appeal.

evidence may not be invoked." *Finnegan* v. *United States*, 204 F.2d 105, at p. 114 (8 Cir. 1953). See also *Pevely Dairy Co. v. United States*, supra; *Beatrice Foods Co.* v. *United States*, 312 F.2d 29 (8 Cir. 1963); *Sykes* v. *United States*, 312 F.2d 232 (8 Cir. 1963); *Hunt* v. *United States*, 316 F.2d 652 (D.C. Cir. 1963). Contrary to appellant's claim, the evidence was not wholly circumstantial. There was also some direct evidence. Moreover, even if we were to view the evidence as wholly circumstantial, the court would not be compelled to determine that all hypotheses flowing from the evidence were as consistent with innocence as with guilt; it would be for the jury to determine the guilt or innocence of the defendant.

In resolving the sufficiency of the evidence question we are required to view the evidence in the light most favorable to the Government, the prevailing party. "It is axiomatic by now that on appeal from a conviction it is not for us to weigh the evidence 'but only to consider whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to become persuaded of guilt.'" *Beatrice Foods Co.* v. *United States*, supra, at 40, and cases there cited.

The Sufficiency of the Evidence.

Before considering the sufficiency of the evidence under Counts 1 and 2, we take note of pertinent background information relating to Counts 1 through 10, the so-called "distributor counts." These counts are concerned with situations in which small dairies had been selling gallon jugs of milk in local markets at a lower price than the price at which National was selling milk in individual paper half gallons. The price differential was necessitated by the disadvantages inherent in gallon jug milk. Gallon jugs contain more milk than many purchasers pre-

fer to buy at one time; jugs are heavy, unwieldly, breakable and not as easily stored as paper cartons. There is usually a deposit required on a gallon jug which is only refundable after the jug has been cleaned and returned. Since small dairies can produce and sell milk in gallon jugs more inexpensively than large dairies can sell milk in paper half gallons, the small dairies were able to offer a substantial differential and still make a profit.

National and its distributors, dissatisfied with gallon jug competition, decided to force the small dairies to raise prices or National would lower its prices enough to substantially reduce or eliminate the differential between the price of a gallon jug and two paper half gallons. National was able to successfully reduce the differential to a point where the small dairies lost considerable business and some of the smaller dairies were forced to either drop the sale of milk in gallon jugs or close their businesses.

Count 1.

Count 1 of the indictment charged that "[b]eginning in or about January, 1955," "and continuing until the return of this indictment" (September 16, 1959) National conspired with its distributor, Merle Martin, "to fix in-store milk prices and to eliminate competition in the sale of milk in the Paola-Osawatomie, Kansas market."[5]

The conspiracy alleged in Count 1 was: (a) that Martin would sell milk to stores at prices agreed upon with National; (b) that National would guarantee Martin a specific gross margin of profit on such sales; (c) that National and Martin would persuade, induce, and coerce

5. "In-store milk prices" are the prices at which milk is sold to stores by a distributor.

small dairies (Pure Gold Dairy and Sheehan Dairy) to fix and maintain a price differential acceptable to National between the gallon jug and two half gallon paper cartons; (d) that National would sell milk to Martin below cost and Martin would resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by the small dairies.

In challenging the Count 1 evidence, appellant contends: (a) that a resale price-fixing agreement between National and its sole distributor in the Paola-Osawatomie market does not constitute unlawful price-fixing in violation of § 1 of the Sherman Act; (b) that National cannot be held responsible for the conduct of its wholly owned subsidiary, Chapman Dairy, during 1955 and 1956; and (c) that there is no competent evidence, after December 31, 1956, to prove that National had entered into a conspiracy with its distributor, Martin, in violation of § 1 of the Sherman Act.

A review of the evidence shows that appellant's contentions are without merit.

There is no longer any doubt about the illegality of vertical price-fixing agreements. Such arrangements, unless they fall within the scope of a state resale price maintenance law, have been found to be illegal time and time again. *White Motor Co.* v. *United States,* 194 F. Supp. 563 (1961), rev'd on other grounds, 372 U.S. 253 (1963); *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960); *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U.S. 373 (1911).

Prior to December 31, 1956, Chapman Dairy was a wholly owned subsidiary of National; National's board of directors approved or disapproved of the proposed list of directors for Chapman; Chapman received National's

approval before making capital investments; Chapman's personnel policies were established by National; Chapman's key employees had stock option plans to purchase National stock; Wise, a National official, had power to override Chapman's president (who had originally been recommended for office by Wise); Wise was kept informed on all decisions made by Chapman's president; Chapman's products were sold under the Sealtest trade name; Wise spent many months in Kansas City (where Chapman Dairy was located); Chapman's production reports were submitted to National for approval and National's officials often conducted the monthly sales department meetings where prices, market conditions, costs and competitors' prices were discussed. We deem it unnecessary to enumerate the other additional facts in the record which show National's close relationship with Chapman.

On December 31, 1956, Chapman Dairy was formally merged with National. In its annual report to stockholders of record in 1956, National described its merger with Chapman as a mere simplification of its corporate structure to increase operational efficiency and to produce savings in income tax. Wise characterized his relationship with the president of National's subsidiary (and after the merger, the manager) as that of a "partner."

The evidence clearly indicates that Chapman was not an *independent* subsidiary of National. The relationship between parent and subsidiary was not one of stock ownership alone. Chapman was run by National in accordance with National's policies and objectives, and with independent existence in form only. In such a situation the courts may disregard the legal fiction of corporate entity. *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic Ass'n,* 247 U.S. 490, 501 (1918). See also *Consoli-*

dated Rock Products Co. v. *Du Bois,* 312 U.S. 510 (1941); *United States* v. *Delaware, Lackawanna & Western R. R. Co.,* 238 U.S. 516 (1915). Cf. *Consolidated Sun Ray, Inc.* v. *Oppenstein,* 335 F.2d 801 (8 Cir. 1964). Since Chapman Dairy was merely an operating division of National Dairy in corporate form, the jury was entitled to find National liable for any conspiratorial conduct in which Chapman might have engaged with its distributor, Martin, prior to the formal merger of Chapman with National on December 31, 1956.

It is hardly debatable that there is an abundance of evidence to show a conspiracy between National, acting through Chapman Dairy, and Martin during 1955 and 1956. During those years and, in fact, during the entire period of time covered by the indictment, the significant competitors in Osawatomie were, in addition to Martin, Pure Gold Dairy and Sheehan Dairy. The only significant competitor in Paola was Pure Gold Dairy. From the evidence the jury was free to find that the conspirators were successful in reducing the differential in price between the gallon jugs, sold by Pure Gold and Sheehan Dairies, and the paper half gallons, sold by National, to a level which made it impossible for the gallon jugs to remain on the market. After a series of price cuts designed to (and which, in fact, did) narrow the differential between gallon jugs and paper half gallons, the smaller dairies lost considerable business and one of them was forced to discontinue the gallon jug and sell its milk in paper half gallons.

Neither are we able to agree with appellant that there is no evidence to show that, subsequent to December 31, 1956, National had a price-fixing agreement with its distributor, Merle Martin. There was probative evidence from which the jury could find that National dictated Martin's prices; indeed, Martin freely admitted that he

adhered to the prices indicated by the Sealtest representatives. Additionally, it was proved that National sold its milk to Martin at a loss during July and August of 1958; in fact, in August, Martin received milk from National at a price lower than National's cost for raw milk.

Count 2.

Count 2 of the indictment charged that "[b]eginning on or about July 15, 1958 and continuing thereafter until about August 27, 1958" National sold milk to its "distributor in the Paola-Osawatomie, Kansas market at unreasonably low prices", "at prices below National's cost" for the purpose of destroying competition.

Appellant tacitly concedes that the evidence affords proof that appellant sold to Martin below cost for about six weeks in July and August, 1958. It contends, however, that there is no evidence that appellant did this "for the purpose of restricting or eliminating the sale of milk" by Pure Gold and Sheehan. Of course, National's officers made no direct references to, nor statements of, National's predatory intent. But the absence of *direct* evidence of that nature does not mean that there was *no* evidence of predatory intent. The jury had the right to consider all of the facts and circumstances and it was fully justified in finding the requisite intent from the course of conduct pursued by appellant. Furthermore, appellant does not question or challenge the evidence of predatory intent which was an essential element of the convictions under the other Robinson-Patman Act counts. Such evidence was relevant for the purpose of showing intent under this count. Cf. *Copeland* v. *United States,* 152 F.2d 769 (D.C. Cir. 1945); *Kowalchuk* v. *United States,* 176 F.2d 873, 877-878 (6 Cir. 1949).

The sum total of the evidence bearing upon Counts 1 and 2 has received our careful consideration. Further elaboration thereon is unnecessary. Viewing the evidence in the light most favorable to the Government, we are convinced that a factual issue was presented, that the court properly denied the motion for judgment of acquittal, and that the jury verdict was supported by substantial evidence.

Count 11.

National and Raymond J. Wise were indicted and made defendants in this count and "[a]ll out-of-State dairies, doing business in the Greater Kansas City market" and their officers and agents were named as co-conspirators. This count charged that "[b]eginning in or about September, 1957 and continuing until some time in October of 1957" National, Wise and the other co-conspirators engaged in a conspiracy to "eliminate price competition in the sale of milk in the Greater Kansas City market" in violation of § 1 of the Sherman Act.

Allegedly the conspiracy consisted of a continuing agreement, the substantial terms of which were: (a) to hold meetings in Chicago, Illinois, and Kansas City, Missouri, to discuss ways and means to (1) require Meyer Sanitary Milk Company to withdraw a discount it had offered on or about August 1, 1957, to Milgram Food Stores, and (2) require small dairies selling milk in glass gallon containers to narrow the price differential between milk sold in such containers and milk sold in paper cartons; (b) to start a milk price war on or about September 13, 1957; (c) to limit the milk price war to the Greater Kansas City market; (d) to increase the milk prices on or about October 10, 1957, to levels above those prevailing in the Greater Kansas City market prior to September 13, 1957,

and (e) to induce and coerce small dairies selling milk in glass gallon containers to raise their prices on or about October 10, 1957.

Relying upon the circumstantial evidence rule discussed, supra, appellant asserts "the evidence * * * fails to support even a strong suspicion that appellant participated in a conspiracy as charged." We are not so persuaded. A careful and thorough review of the record indicates that there was substantial evidence from which the jury could legitimately infer that there was a conspiracy between National and other out-of-state dairies to cause a price war with the dual purpose of (a) forcing Meyer Sanitary Dairy to withdraw the 13% discount offer made to the chain of Milgram Stores, which was one of National's largest accounts in Kansas City, and (b) narrowing the price differential between gallon jugs and paper half gallons. It is well settled that:

> "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809-810 (1946).

See also *Johnson* v. *Yost Lumber Co.,* 117 F.2d 53, 57 (8 Cir. 1941); *Esco Corp.* v. *United States,* 340 F.2d 1000 (9 Cir. 1965), where the court pertinently observed at 1007:

> "While particularly true of price-fixing conspiracies, it is well recognized law that any conspiracy

> can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. * * * A knowing wink can mean more than words."

In addition to statements made by gallon jug operators and officials of the out-of-state dairies, it appears without dispute that during the indictment period there were at least six meetings or conversations between National officials and officials of one or several out-of-state dairies at which prices, Meyer Sanitary Dairy's discount offer to Milgram, or gallon jug differentials were discussed. The record also indicates that National supplied some proposed price lists to the out-of-state dairies and informed them of intended price changes. Significantly, price changes were always simultaneously and uniformly effected by National and the out-of-state dairies. Further detailing of the evidence is not required. It is abundantly clear that the jury's verdict under this count does not rest upon mere suspicion but rather upon substantial probative evidence.

Count 13.

This count, as supplemented by the Bill of Particulars, charged that National, from July 14, 1958 through August 27, 1958, sold milk in the Greater Kansas City market at "unreasonably low prices" for the purpose of destroying competition; that National utilized the advantages it possesses because it operates in a great many different geographical localities, to finance and subsidize a price war against the small competing dairies by intentionally selling milk at prices below its cost.

Here, the basic controversy is whether appellant, during the period of time covered by this count, sold its milk "below cost." The answer depends upon the meaning

of the term "below cost." Appellant contends that a below cost sale is one made at a price lower than direct cost, i.e., raw material (milk), processing and container costs. The Government disagrees and asserts that a below cost sale is one made below fully distributed cost, which includes the cost of production, plus the additional allocated delivery, selling and administrative costs.

This precise question was not settled by the Supreme Court when it decided that § 3 of the Robinson-Patman Act, which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," is not unconstitutionally vague or indefinite, as applied to sales made *below cost* and with specific intent to destroy competition. *United States* v. *National Dairy Products Corp.*, supra.

The Court was careful to state that its opinion was not to be construed as a categorical denouncement of every sale below cost. It recognized that certain business exigencies could justify such a practice. It announced that "[i]n proscribing sales at 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor' we believe that Congress condemned sales made below cost *for such purpose.*" (Emphasis supplied). *Id.* at 34. And "[w]hether 'below cost' refers to 'direct' or 'fully distributed' cost or some other level of cost computation cannot be described in the abstract." *Id.* at 34.

Although the Court tacitly recognized the difficulties inherent in placing reasonable boundaries on its holding, it stressed the need for a "predatory intent" in connection with the sale of goods below cost.

We have carefully studied *National Dairy Products* and conclude that it teaches: (1) that liability under § 3 may be imposed when the following elements are present; (a)

sales at prices below some level of cost, and (b) intent to destroy competition or eliminate a competitor; (2) that the question whether sales are "unreasonably low" so as to impose liability under § 3 must be determined on the facts of each case—on an ad hoc basis; and (3) that the predatory or competitive nature of the seller's price, rather than theoretical cost considerations, is the real index of its legality. The question resolves itself into one of intent and purpose, not a choice of accounting methods. See also Rowe, "Price Discrimination Under the Robinson-Patman Act," p. 466; *Ben Hur Coal Co.* v. *Wells*, 242 F.2d 481 (10 Cir. 1957); *Hershel California Fruit Products Co.* v. *Hunt Foods, Inc.*, 111 F.Supp. 732, 734 (1953); *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F.Supp. 180, 189-190 (1951).

Guided by the foregoing principles, we have no great difficulty in concluding that even though appellant made no sales below *direct cost* during the period of time covered by Count 13, the question whether it violated § 3 by selling below *fully distributed cost* was, in view of all the facts and circumstances, one to be resolved by the jury under proper instructions. Appellant, a nation-wide corporation, with immense financial resources, was able to, and did, make sales in July and August, 1958, in the Greater Kansas City market considerably below its fully distributed costs. National's operating statement shows that in July and August its losses in that market computed on the basis of fully distributed costs, were over $46,000 and $73,000 respectively. Of course, such below cost sales were not sufficient, standing alone, to subject National to the sanctions of § 3. It was incumbent upon the Government to offer evidence that such below cost sales were concomitant with a predatory intent. And, contrary to appellant's claim, there was evidence from

which the jury could, and did, find that appellant's practices were designed to destroy competition or eliminate a competitor. We hold that the district court properly submitted this count to the jury.

Grand Jury Minutes.

The Government called as witnesses persons who had been officers and employees of National or of co-conspirator corporations. During direct examination some of these witnesses indicated a tendency to forget, or an inability to recall, pertinent facts. The first occurrence of this nature took place during the direct examination of the Government's third witness, John Flanagan, the general sales manager for Sealtest Foods (a division of National) in Kansas City, Missouri. Upon request of the Government attorney for permission to use the grand jury transcript or minutes, to refresh the witness' recollection, a lengthy conference ensued in chambers. In this conference the court directed that grand jury testimony be used in accordance with the following guidelines: (1) that Government counsel would "make its trial inquiry in substantially the same language as the question was asked the witness before the grand jury * * * ;" (2) that Government counsel would mark in advance all of a witness' testimony relating to the topic to be refreshed, and designate specifically the questions in the transcript that the Government contemplated asking; (3) that the court would determine whether the questions that the Government intended to ask "would reasonably have the effect of refreshing the particular witness' memory;" and (4) that Government counsel themselves would read the grand jury transcript but not "in an accusatory manner" and without histrionics, and "if counsel inadvertently became enthusiastic about the manner and the tone in which they

would utilize this testimony * * *," the trial judge would conduct the examination himself. Also, the witnesses would not be permitted to examine their prior testimony.

Counsel for National and Wise, apparently recognizing that grand jury minutes, under proper circumstances, may be used for the purpose of refreshing the recollection of witnesses, offered no objection to the procedure envisioned by the court. They did, however, move unsuccessfully for the privilege of examining the portions of the grand jury transcript which the Government intended to use. Neither does appellant, on this appeal, dispute that the Government was entitled to use the grand jury transcript for refreshment purposes. Rather, it contends that the court permitted Government counsel to use the grand jury testimony for impeachment purposes and as substantial evidence and, therefore, that the court erred in denying its motion to inspect the transcript.

It is fundamental that grand jury proceedings are cloaked with a veil of secrecy. "Grand jury testimony is ordinarily confidential." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943); *Beatrice Foods Co.* v. *United States*, supra. This "indispensable secrecy of grand jury proceedings," *United States* v. *Johnson*, supra, at 513, may be disregarded only when there is a compelling necessity—when the need outweighs any countervailing policy. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959). The inspection of grand jury minutes and the use of grand jury testimony have been permitted for the purpose of refreshing witnesses' recollections. *United States* v. *Socony-Vacuum Oil Co.*, supra, (in which there were ninety instances when the Government used grand jury testimony to refresh recollection of

witnesses); *Cox* v. *United States,* 284 F.2d 704, 706 (8 Cir. 1960). No iron-clad rule requires that counsel for the defense be shown the grand jury transcript where, as here, it is not shown to the witnesses and where, as here, an appropriate procedure is adopted and followed to prevent its improper use. *United States* v. *Socony-Vacuum Oil Co.,* supra, at 233. In the final analysis, the question whether disclosure should be permitted is one addressed to the sound discretion of the trial court. Rule 6(e) F.R. Cr.P.; *Pittsburgh Plate Glass Co.* v. *United States,* supra, at 399.

However, error would result when the prior testimony is used as substantial evidence, *United States* v. *Socony-Vacuum Oil Co.,* supra, at 234; *Cox* v. *United States,* supra, at 708, or when it is used for impeachment purposes, if the defendant is denied the right to inspect such prior testimony, *United States* v. *Cotter,* 60 F.2d 689 (2 Cir. 1932); cf. *Continental Baking Co.* v. *United States,* 281 F.2d 137, 146-148 (6 Cir. 1960); or when the refreshing material is deliberately used for purposes not pertinent to the issues to arouse the passions of the jurors, so that an objective appraisal of the evidence is unlikely. *United States* v. *Socony-Vacuum Oil Co.,* supra, at 234.

The record does not support the argument that the grand jury testimony was used for impeachment purposes or as substantial evidence and no objection of either nature was made during the trial. Appellant's failure to object on this ground would justify us in declining to consider this allegation of error. Rule 51 F.R.Cr.P.; *Isaacs* v. *United States,* 301 F.2d 706, 734-736 (8 Cir. 1962); *Cox* v. *United States,* supra, at 709.

We have nonetheless considered the contention on its merits. Use of the grand jury testimony was limited to the stated purpose of refreshment, in strict conformity

with the court's instructions. The court took every precaution to limit the jury's consideration of the evidence. Thus, when the question arose, the court explained to the jury:

> "The important thing for the jury to keep in mind is that whatever document may be used to refresh a witness' recollection, whether it is a telephone book, whether it is a letter that he may have written, whether it is transcribed testimony before a grand jury, the particular document that is used for that purpose is not to be considered by you as affirmative evidence in this case. It is merely used for the purpose of refreshing the witness' recollection. The witness' recollection may be refreshed, and if it is, he will say so."

The jury was similarly reminded as the trial progressed, and finally this instruction was given:

> "You will recall that there were several occasions when some testimony taken before the grand jury or before a Congressional Committee was read to a witness for the purpose of refreshing his recollection. Such testimony is not evidence and the only purpose in having it read was to attempt to revive or refresh the memory of the witness."

In summary, no judicial abuse of discretion has been demonstrated.

Appellant claims that yet another error arose from the use of the grand jury testimony.

Government counsel furnished the court, but not appellant's counsel, with memoranda, before the examination of the first witness whose grand jury testimony was used for refreshment purposes. Here, appellant takes the position that "[n]ot until perfection of this appeal did [it] learn that the 'citations' furnished to the court * * * included a legal memorandum, and * * * material other than

citations to the grand jury transcript."[6] Appellant's claim of error is that the "*ex parte* 'refreshment' memoranda together with its *ex parte* legal memorandum were calculated to," and "actually did, influence the court's rulings both on points of law and on evidence, adversely to appellant."

We are not impressed with the urgency of this contention. The first section of the memorandum contains a fair and accurate exposition of the law relating to the secrecy of grand jury proceedings, the use of grand jury testimony for refreshment purposes, the discretion of the trial court when grand jury testimony is used for refreshment purposes, and the right of the defense to inspect. How this legal data prejudiced appellant is beyond our comprehension. It is clear from the conference relating to the use of the grand jury testimony that counsel for appellant were fully cognizant of all legal principles stated in the memorandum. Moreover, no claim is now made that the legal memorandum contained any misstatements of the law.

The second section of the memorandum contains the names of eleven witnesses who testified before the grand jury, whom the Government expected to call as witnesses

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6. The record belies appellant's assertion that it was uninformed as to the contents of the memoranda until the appeal was perfected. Early in the trial, immediately after the Government had called a witness, the court, out of the hearing of the jury, stated to counsel:

> "In accordance with our practice on the Grand Jury notes, the Government has handed me a memoranda of some nine points."

The court then elaborated upon three of the points and gave specific instructions to Government counsel in regard to use of the witness' grand jury testimony for refreshment purposes. Counsel for the defense made no claim of surprise nor request to examine the memoranda referred to by the court.

in the trial. It stated the facts that the Government hoped to elicit from the witnesses, the page reference to the specific material Government counsel intended to read, page references to other material relating to the same subject, and short statements explaining the context of the material.

Again, we are unable to find any prejudicial material in this section of the memorandum. It is evident that the memorandum was designed to aid the court in familiarizing itself with the grand jury transcript, prior to refreshment. According to statements made by the judge, the memorandum accomplished this purpose. But nothing emerges from the record to furnish any foundation for appellant's assertion that the memorandum "actually did influence the court."

The Court's Charge.

Appellant's numerous contentions of error are presented in reference to four specific parts of the instructions: (a) the summarizing and outlining of the evidence; (b) the instructions on the Sherman Act counts; (c) the instructions on the Robinson-Patman Act counts; and (d) the "general" charge to the jury.

Summary and Outline of the Evidence.

Appellant asserts that the court summarized and outlined the allegations of the different counts and the evidence favorable to the prosecution but did not similarly summarize and outline appellant's contentions and the evidence favorable to it; that the summary was one-sided and, therefore, prejudicial to appellant.

A Federal Judge, in a criminal case, is more than a moderator or umpire. He is not a "mere automatic oracle

of the law, but a living participant in the trial, and so as the limitations of his position permit should see that justice is done." *Rudd* v. *United States,* 173 F. 912, 914 (8 Cir. 1909). The judge may "assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia* v. *United States,* 289 U.S. 466, 469 (1933). See also, *Franano* v. *United States,* 310 F.2d 533, 537 (8 Cir. 1962); *Northcraft* v. *United States,* 271 F. 2d 184, 188-189 (8 Cir. 1959).

To be sure, the judge must not become an advocate for either party. *Stoneking* v. *United States,* 232 F.2d 385, 389-390 (8 Cir. 1956), and cases there cited. "[S]ince a trial judge's influence upon a jury is necessarily of such great magnitude, [he] should exercise care and discretion in expressing an opinion so as not to mislead or, in effect, to destroy the jury's right as the sole arbiters of all fact questions." *Franano* v. *United States,* supra, at 537, and cases there cited. As stated by Judge Hand, "There is no inevitable necessity in a criminal case that the judge shall state the evidence in his charge—'marshal' it, as it is called in England." *United States* v. *Gillilan,* 288 F.2d 796, 798 (2 Cir. 1961). If the court does undertake to review the facts for the purpose of aiding the jury, it must do so in fairness to both sides. *Cline* v. *United States,* 20 F.2d 494, 496 (8 Cir. 1927); *Boatright* v. *United States,* 105 F.2d 737, 739-740 (8 Cir. 1939), and *Benes* v. *United States,* 276 F.2d 99, 103-104 (6 Cir. 1960).

The court's charge was exhaustive and comprehensive. Almost five hours were required to deliver it. Apparently the court had prepared an outline of all the pertinent portions of the evidence which it felt should be called to

the jury's attention. As the final argument of counsel progressed, the court eliminated from its outline evidentiary matters that were covered by counsel.[7]

We, of course, must consider the instructions as a whole in determining whether a particular statement conveys an erroneous impression to the jury. *Beatrice Foods Co.* v. *United States*, supra, at 47; *Northcraft* v. *United States*, supra, at 189; *Stoneking* v. *United States*, supra, at 389.

We have carefully read the entire charge and have focused our attention particularly upon those portions which appellant claims exceeded the bounds of propriety. The judge did not emphasize and unfairly comment upon evidence favorable to the Government. The court expressly informed the jury:

> "I want to say in connection with the specific counts at this time that I do not intend to exercise the power vested in a trial judge in the Federal system to make any comment upon the evidence or upon the testimony of any particular witness. That is your job. It is your job to make judgment of the facts in this case. I will make reference to the fact that my outlines do not constitute a comment or indicate in any way feeling that I may have as to the testimony of any witness that has been on that witness stand."

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7. At the outset of the instructions, Judge Oliver informed the jury that:

> "• • • the arguments of counsel in this case focused and directed attention to many of the facts and circumstances upon which their respective arguments were based, and the specific references to times and to places and persons and events has reduced greatly the amount of time that will be required by me so far as making any outline of the evidence to you is concerned. • • • this jury received an excellent review of all the evidence by the highly competent counsel representing all the parties in this case."

The judge assiduously adhered to his stated intention. He refrained from commenting upon, interpreting or drawing any conclusions from the evidence. It is true that, in instructing on each count, the judge did, upon occasion, direct the jury's attention to certain evidence and he did remind the jury of certain incidents which were established by undisputed evidence, but we find no unfairness in his statements. At no time did the judge become an advocate for the Government or attempt to usurp the function of the jury. On the contrary at the outset of the charge, the jurors were told: "• • • you are the sole judges of the facts in this case. • • • You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves." After directing attention to a meeting attended by defendant, Wise, the court instructed: "You must determine what was said, who said it, determine what testimony you are going to believe. • • • These are the types of questions relating to the conflict in the evidence that you must decide in your determination of the factual issues presented by the 1957 market situation relating to Count 11." In concluding its charge, the court stated: "Remember that our quest is for truth and to see that justice be done. Justice is not done unless you follow and apply the law to the facts as you find them in this case."

We are convinced that the portions of the instructions under attack comport with the legal standards enunciated, supra. The fact that appellant was acquitted on Counts 14 and 15, in regard to which the court's references to the evidence were no different, belies the assertion of one sidedness and prejudice. The acquittal on these counts demonstrates that the jury was fully aware of its reponsibility and that it decided the case in accordance with its view and understanding of the evidence.

Instructions on Sherman Act Counts.

Relying principally upon *Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911 (5 Cir. 1952), and *Poller* v. *Columbia Broadcasting System, Inc.,* 284 F.2d 599 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962), appellant asserts error because the court refused to instruct that a corporation cannot be found guilty of conspiring with its own officers, employees or agents. The short answer to this is that the instructions that were given included the matter covered by the refused instruction. In clear and unambiguous language the court required the jury to find, as a prerequisite to any verdict of guilty, that the defendant or defendants had conspired with others—competing dairies or distributors. That, of course, was the theory upon which the case was tried. The Government never contended that the crimes charged rested upon a conspiracy between National and its own employees. Inasmuch as the instructions given properly declared the law, no prejudice resulted from the failure to give the offered instruction.

Appellant further contends that the court erred in instructing the jury that a mere "unity of purpose" would justify the finding of an unlawful conspiracy. A sufficient answer is that no exception was taken, as required by Rule 30, F.R.Cr.P. Even if we were to assume (which we do not) that the statement was erroneous, the error was not so prejudicial as to require application of Rule 52(b), F.R.Cr.P. (plain error). The fact is that the instructions which submitted the Sherman Act counts, considered in their entirety, correctly declared the law and provided a proper guide for the jury in its deliberations.

Appellant advances other complaints of a minor nature about the instructions as they relate to the Sherman Act

counts. These complaints have been considered and are found to be lacking in substance.

Instructions on the Robinson-Patman Act Counts.

Appellant attacks the charge which submitted the Robinson-Patman Act counts on several grounds. We have carefully considered all of them.

It is manifest from statements made by Judge Oliver, during the course of his consideration of the over-all charge that he intended to give, that he was thoroughly familiar with the Supreme Court's opinion in *National Dairy Products,* supra. It is likewise evident that the judge carefully framed the instructions to comply with the principles enunciated by the Supreme Court. Thus, at the outset of the charge, he instructed:

> "When the Congress passed Section 3 of the Robinson-Patman Act, it condemned sales made below cost if it should be determined as a matter of fact that such sales were made, in the language of the statute, at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> * * * * * * * *
>
> "The Congress required proof of a predatory intent on the part of one charged with violation of Section 3 of the Robinson-Patman Act.
>
> "The law requires that proof of such an intent, proof of an intent to sell at unreasonably low prices in furtherance of a purpose of destroying competition, be made beyond a reasonable doubt. Basically, Section 3 of the Robinson-Patman Act is directed at business conduct designed to destroy competition.
>
> "Now, of course, neither Section 3 of the Robinson-Patman Act nor any other law of Congress can be evaluated or applied in the abstract. It is quite clear that Section 3 is not to be applied to hold that every

> sale that is made below cost is to be determined to be a sale made at an unreasonably low price for the purpose of destroying competition or eliminating a competitor."

The jury was further specifically instructed that, as a prerequisite to a verdict of guilty on each of the Robinson-Patman Act counts, they were required to find "beyond a reasonable doubt that National sold below cost and that such prices were unreasonably low for the purpose of destroying competition," and the jury was also required to make "a finding of predatory intent beyond a reasonable doubt and find that the sale below cost was unreasonably low beyond a reasonable doubt."

Appellant complains in particular because the court submitted the fully distributed cost theory to the jury. Attention is focused upon Count 13, the contention being that, as to this count, "it's [National's] challenged price in Kansas City was *above* its cost of production. * * * Accordingly, as to this count there was a clear failure of proof of an essential element of the offense charged * * *." The cost issue was submitted in the following manner:

> "In this connection, the Government urges that the sales were unreasonably low because they were below National's total costs, calculated on an average unit basis for that product, usually a half gallon of homogenized milk in a paper container * * *. Defendants dispute this and contend that their costs must be limited to the cost of raw milk plus the cost of paper containers. It is for you to decide whether or not the prices National charged were below cost and were unreasonably low. * * * Of course, the question of whether or not the low price charged is unreasonable will also depend upon the purpose behind it about which I have attempted to instruct you fully."

We do not believe that there was error in this submission. Although appellant's price, relating to Count 13, was above direct cost, concededly, it was below fully distributed cost, and since we determined, supra, that the record contains ample evidence of predatory intent, it was a fact question, properly submitted to the jury, whether sales below *fully distributed* costs were "unreasonably low" and were made for the purpose of destroying competition or eliminating a competitor.

General Charge.

Finally, appellant contends that the court erred in its "general" charge to the jury.

The assertion that the court did not advise the jury that appellant's guilt must be established beyond a reasonable doubt is patently frivolous. Throughout the charge, the jury was instructed as to the standard to be applied. Indeed, at the conclusion of the charge, Government counsel complained that "the court has overly stressed the reasonable doubt aspect in the giving of its instructions * * *."

The instruction relating to liability of National for the acts and declarations of its agents properly declared the law. *Egan* v. *United States,* 137 F.2d 369 (8 Cir. 1943), cert. denied 320 U.S. 788 (1943); *Continental Baking Co.* v. *United States,* supra.

Likewise, the court properly instructed that National was responsible for the acts of Chapman Dairy and its agents prior to December 31, 1956, if the jury further found that National dominated and controlled the operations of Chapman. We have heretofore demonstrated at some length that there was substantial evidence to sup-

port a finding that Chapman's operations were in fact completely dominated and controlled by National.[8]

Further discussion of the alleged errors in the instructions would add nothing. It is sufficient to say that a studious examination of the instructions, in context, fails to reveal any prejudicial defects therein.

The Court's Attitude.

Appellant asserts "the Court's attitude was highly prejudicial," and "[w]hile appellant does not contend that the trial court intentionally prejudiced its defense, the judicial acts * * * described were in fact 'calculated' to, and did, deprive appellant of a fair trial."

The persistence and zeal with which counsel present the claims of prejudicial conduct contrasts sharply with their failure to exhibit concern about the asserted unfairness during the trial. The undisputed fact is that not once in the protracted trial, requiring a countless number of rulings by the court, did counsel even intimate that they believed appellant was the object of judicial prejudice.[9] Cf. *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F.2d 46, 55-56 (8 Cir. 1958).

The issue of prejudice was first raised in the motion for new trial. Yet, in oral argument on the motion, Mr. Chadwell, chief counsel for appellant, stated:

> "I want to repeat very sincerely, Your Honor, what Mr. Purcell has said, that is, by anything that we

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8. See our consideration of appellant's challenge to sufficiency of evidence to support conviction under Count 1.

9. Appellant did object to the court's ruling during cross-examination of witness Theno. The "Theno incident" is set out in full in the trial court's opinion denying the motion for new trial at 231 F.Supp. 663 (1964).

have said in our briefs or anything that he has said or anything I will say, we want to make very clear in the record that we do not wish Your Honor to understand that we are in any way indicating a belief that Your Honor was other than sincere and honest in your rulings from beginning to end in this trial. We don't think that at any time you were out to get us or out to get the defendants, but you tried to preside in this case fairly. We don't say anything else, and I want the record to make that clear."

As reference to Judge Oliver's post-trial opinion, 231 F.Supp. 663 (1964), will disclose, he considered the claims of judicial unfairness at length and demonstrated beyond any doubt that appellant's assault upon his judicial demeanor is wholly unwarranted and completely without basis.

The failure to object or take appropriate exceptions notwithstanding, we have examined the contentions in light of the plain error rule [Rule 52(b), F.R.Cr.P.], and find that, without exception, they are lacking in substance. Judge Oliver presided over the long and hard-fought trial with judicial poise and commendable fairness. This record simply does not lend any support to claims of judicial intemperance or irritation. The judge did not limit or restrict appellant's right to examine witnesses; he did not disparage appellant's defense; his questioning of witnesses was not prejudicial, and his rulings on evidentiary questions did not favor the Government. In short, we conclude that appellant's claim of judicial misconduct borders on the frivolous.

Rulings on Evidence.

Appellant lists three basic contentions of error in regard to the reception of evidence: (1) that hearsay declarations were improperly admitted; (2) that two hearsay

documents were improperly admitted; and (3) that evidence of appellant's corporate size and market power was improperly admitted.

Hearsay Declarations.

It is well settled that the statements of conspirators are admissible against all members of a conspiracy so long as there is other independent evidence showing that there was, in fact, a conspiracy between the declarant and the others. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 249 (1917); *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110, 116-117 (1948). The trial court properly instructed the jury as to the evidentiary worth of such statements.[10]

Appellant insists that, while statements of defendant co-conspirators may be admissible, statements of non-defendant co-conspirators are not admissible. This contention has been rejected by the case of *Clune* v. *United States,* 159 U.S. 590, 593 (1895) and, more recently, by the case of *Esco Corp.* v. *United States,* supra, at 1008-1009.

Appellant also objects to the admission of statements

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10. The judge's instruction to the jury was in part as follows:

"I instruct you that acts or declarations of any alleged co-conspirator, or conspirators, may not be considered by you until and unless you find beyond a reasonable doubt that a combination and conspiracy had in fact been formed and the alleged conspirator or conspirators are identified with it.

* * * * * * * *

"It would be a matter of first order in your consideration of any of the separate and particular Sherman Act counts for you to inquire in each instance whether or not the Government has proven that a particular combination and conspiracy existed by independent evidence and beyond a reasonable doubt before you are warranted in considering any actions or declarations by any alleged co-conspirator, purportedly made pursuant to that particular conspiracy."

made by others, neither co-conspirators nor employees. We are convinced, after careful consideration of the testimony complained of, that the statements were properly admitted and did not fall within the hearsay exclusionary rule.

Hearsay Documents.

Appellant, on the grounds that they are "rank hearsay," claims that the trial court erred in admitting two of the Government's exhibits. The record shows, however, that a proper foundation for their admission was laid. Even assuming, which we do not, that two documents had been improperly admitted, it is difficult to comprehend that, of the more than 600 exhibits received, two documents containing facts which were substantiated by proper testimony of many witnesses, could have been prejudicial to appellant.

Evidence of Appellant's Corporate Size and Market Power.

Appellant contends that evidence of its corporate size and market power was irrelevant, immaterial and prejudicial. While it is well established that size is not an element of the offense of conspiracy under § 1 of the Sherman Act, corporate size can be relevant, especially when conspiracy to cut prices is charged. *United States* v. *Socony-Vacuum Oil Co.*, supra, at 239. However, the trial court properly instructed the jury that corporate size and power was not to be considered as evidence of conspiracy under the Sherman Act counts. Appellant was not prejudiced nor was the admission of evidence of its corporate size irrelevant and immaterial under the Sherman Act counts.

Evidence of corporate size and power was even more relevant to the Robinson-Patman Act counts. In *United States* v. *National Dairy Products Corp.*, supra, the Supreme Court quoted from *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120, 119 (1954):

> "'Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business' through programs in which 'profits made in interstate activities would underwrite the losses of local price-cutting campaigns.'" (at p. 34)

The record discloses that National's Kansas City milk division lost a substantial sum of money during the period charged in the indictment. Evidence of National's overall size and financial power was directly relevant to show National's ability to underwrite and subsidize any local plant losses.

Other complaints about the admission and exclusion of evidence are made by appellant. The complaints are too numerous to be discussed individually without greatly extending this already lengthy opinion. Suffice it to say that we have carefully examined each of them and conclude that the court's rulings were not prejudicial.

In conclusion, the following observations are relevant. Both the Government and appellant were represented in the district court and on appeal by highly competent and skilled advocates. This prosecution has produced a history of every conceivable motion and numerous legal memoranda. The case has twice been to the Supreme Court. From the filing of the indictment to the filing of the notice of appeal fourteen volumes of "pleadings" have been amassed. In such a hotly contested and protracted legal battle, mistakes do occur. "The human element cannot be eliminated from lawsuits." But, as always, the crucial question is, were there any mistakes or errors of a prejudicial nature? We conclude there were not.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,734
September Term, 1964

National Dairy Products Corporation,
Appellant,

vs.

United States of America

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 27, 1965.

Order entered in accordance with Opinion:

[ROBERT C. TUCKER]
Clerk, U. S. Court of Appeals for the Eighth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1965

No. 17734

National Dairy Products Corporation, Appellant, vs. United States of America.	Appeal from the United States District Court for the Western District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

September 23, 1965.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATIONAL DAIRY PRODUCTS CORP., and RAYMOND J. WISE,
Defendants.

No. 20542

MEMORANDUM AND ORDER

This case pends on the separate motions of defendant Wise and defendant National for judgment of acquittal, notwithstanding the verdict and, in the alternative, for a new trial as to Counts Eleven, Twelve and Thirteen, and on the similar separate motion of defendant National in regard to Counts One through Ten.

The motions that relate to the Kansas City counts, (Counts Eleven, Twelve, and Thirteen) are identical except that paragraph 16 of defendant Wise's motion alleges in addition that we erred in refusing to sever defendant Wise and accord him a separate trial on the Kansas City counts for the reason that the introduction of evidence against defendant National on all the counts prevented defendant Wise from obtaining a fair trial in connection with the only counts in which defendant Wise was charged.

Defendant National's motion in regard to the distributor counts (Counts One through Ten, inclusive) contain many paragraphs that duplicate the allegations made in regard

to the Kansas City counts and, except for naming different witnesses and different exhibits, follows the same general pattern of the separate motions that relate to the Kansas City counts.

The reasons assigned in all the pending motions, with one exception to be noted, are the reasons that careful lawyers usually assign in such motions in order that all questions of possible error be preserved for appellate review. For example, paragraphs 1 through 3 of defendant National's Kansas City counts motion are directed to our charge to the jury; paragraphs 4 through 9 relate generally to our rulings on questions of evidence; paragraph 10 and 11 are directed to the use we permitted and the procedure we followed in connection with the Grand Jury transcript; paragraphs 12 through 15 preserve defendants' various contentions concerning our refusal to sever and to grant separate trials, both in regard to the two defendants and in regard to the particular counts of the indictment; paragraphs 17 through 19 allege in general and usual fashion that the verdict is contrary to the weight of the evidence, that it is not supported by substantial evidence, and that it is contrary to the law; paragraph 20 alleges that we erred in denying the motion for acquittal filed at the conclusion of the Government's case and again at the close of all the evidence; and paragraph 21 alleges that we erred in overruling defendant Wise's motion to dismiss Count Thirteen.

Paragraph 16 of defendant National's motion, which we noted above as an exceptional allegation, reads as follows:

> "16. The defendants were substantially prejudiced and deprived of a fair trial by reason of the comments and rulings by the Court, the restrictions placed by the Court upon cross-examination and presentation of evidence by defendants, and by the attitude of the Court toward defendants, defendants' evidence, and defendants' counsel during the trial."

The allegation just quoted is made in identical language by both defendants in regard to each count to which their separate motions are directed. (See paragraph 17 of defendant Wise's motion and paragraph A.11 on page 3 of defendant National's distributor motion directed to Counts One and Two. And see also paragraphs B.1 on page 3, C.1 on page 4, D.1 on page 4, and E.1 on page 5 of National's distributor motion where paragraph A.11 relating to Counts One and Two is incorporated by reference as being applicable to all of the other distributor counts).

In spite of the over 1000 pages of the post-trial briefs that have been filed, we do not believe it necessary for us to write an extensive memorandum and opinion in support of our action on the pending motions. In connection with the major contentions presented, the transcript reflects our particular rulings and the reasons upon which those rulings were based. We have studied the briefs filed; we have read the authorities cited; we have again considered each of the over 7300 pages of the transcript of the trial proceedings and are satisfied that the defendants had a fair trial and that defendants' contentions are not tenable.

In our memorandum and order of May 1, 1963, prior to trial, we ruled defendant Wise's motion for a separate trial. We there cited and applied what we believed are the controlling authorities. At several points during the trial we reviewed the question of whether Rule 14 should be invoked.* We then determined that no necessity existed for its invocation. We are still of that view.

In like manner, our reasons for refusing to dismiss Count Thirteen are fully stated in another memorandum and order dated May 1, 1963. Our reconsideration of that question does not incline us to change our view of that question.

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* See Tr. 2846 and Tr. 2890 for examples of record.

Both at the close of the Government's case in regard to the Kansas City counts and at the close of the Government's case in regard to the distributor counts, we called for briefs and heard extended oral argument on the question of the sufficiency of the evidence. The substance of the defendants' theory then presented is substantially the same as the substance of most of the arguments presented in more elaborate fashion in the post-trial briefs in support of defendants' motions for acquittal. See Tr. page 2764 to 2826, and Tr. 4605 to 4672. On pages 2828 to 2839 and on page 4672 to 4677, I expressed my views concerning the questions presented. My review of the entire record and my study of the briefs and the authorities cited does not convince me that the motions for acquittal should have been sustained.

A comparison of the arguments made at trial with the arguments made in the post-trial briefs, of course, reflects that the defendants in this case, after verdict, are more prone to indulge in vindictive and expletive language against the Government witnesses and the Government itself than they did in the arguments made during the trial. But we must, of course, judge the sufficiency of the evidence on the basis of the testimony as actually given. The post-trial argument that there was "nothing but suspicion as a basis for a finding of conspiracy" (page 41 of National's acquittal brief), for example, was made to and rejected by the jury (Tr. 6939, 6944-6945). We have determined that there was substantial evidence to support the verdict. We must and shall therefore rule that defendants' motions for acquittal notwithstanding the verdict must be denied.

We turn now to the alternative motions for new trial. In that connection we have again reviewed our charge. We obviously thought it fair when we gave it, or we would not have given it. We sought the aid and assistance of counsel

early in the case and repeated our request for assistance at frequent intervals thereafter (see Tr. 2626, 2837-2839, 4676-4677, 5815-5822, 6585-6588). We used the assistance proffered and express our appreciation to counsel for their efforts.

We have reviewed our charge in light of our restudy of the transcript and are convinced that defendants' complaints do not go to matters of real substance.

In regard to defendants' comments concerning the outline of the evidence that had been adduced by both sides in connection with the particular counts, we have noted with some interest the suggestion made by Edward Bennett Williams in the panel discussion on The Problems of Long Criminal Trials held at the Judicial Conference of the Second Circuit last September as reported in 34 F.R.D. 155, at page 187. Mr. Bennett suggested:

> "I think that the jury can best be helped if the legal abstraction is superimposed on the facts in evidence and the judge points out to the jury the possible points of incidence. Now, what I'm suggesting is that in these cases the courts exercise their right to review the evidence and, if necessary, to comment on it. I suppose this sounds most unorthodox coming from a defense lawyer because generally when a trial judge suggests that he's going to talk about the evidence trial lawyers on the defense side of the table are struck with palsy, but I have enough faith in the objectivity of the trial bench to believe that they can be helpful to juries in delineating the evidence against a specific defendant and that no prejudice will inure to defendants from following this practice."

We did not believe that justice required that we comment on the evidence adduced by the parties. We so advised the jury (Tr. 7117). We did, however, believe that an outline of the evidence in regard to each count would focus attention

on the questions of fact that the jury was required to decide. We are confident that our repeated reference to what was said in regard to the outline and its purpose (Tr. 7061, 7117, 7149, 7155, 7160) and our closing instruction that the jury should not regard anything said in the instructions as suggesting what we would do if we were acting as a juror (Tr. 7211) could not have been misunderstood or misconstrued.

Of course, we agree with Judge William B. Herlands' statement as a member of the same panel to which we have made reference, that "it is much easier to love justice than to administer it," (l.c. 175 of 34 F.R.D.). But we do not share defendants' evident agreement with the idea that a defendant has only a 50-50 chance of obtaining a fair verdict in a criminal trial and that we fool ourselves if we believe that a jury of laymen can listen to a three-hour oral charge and retain it (see footnote 7 on page 12 of Defendant National's acquittal brief).

At the close of the Government's evidence on the Kansas City counts, we gave an interim charge to the jury in order to provide a sharp separation between the evidence received against both defendants in regard to the Kansas City counts and the evidence that would immediately be adduced against only defendant National on the distributor counts (Tr. 2871-2885).

Counsel for the defense, after preserving defendants' position in regard to separate trial (Tr. 2845-2850, 2877, 2888-2889), and after stating that our statement to the jury as to how the distributor counts evidence was and was not to be considered (Tr. 2878-2885) was "a fair statement," commented that "I just don't think it is humanly possible for the jury to keep all this vast amount of evidence separate in their minds" (Tr. 2891). In further argument, defense counsel reiterated that "I think it is just physically

impossible, mentally impossible to keep this straight and to follow the rule of law [as] to each count. . . . " (Tr. 2895).

Counsel's discussion of the obvious problem that protracted cases present to the administration of justice prompted us to make the following comment:

> "THE COURT: I would make this comment here on the ability of a juror to keep straight [in] this, and I would add, any other anti-trust case. All of this proceeds on the assumption that the guaranties of the Sixth Amendment to a jury trial is calculated to be the best system for the ascertainment of fact.
>
> "There is some slight difference of opinion on the subject as to whether this is the best instrument for the ascertainment of fact, but the presumption and the theory upon which we work is that it is, and I am quite sure that you share with me the system works almost in spite of its unwieldiness, if the great experience of other lawyers and other courts are intelligently applied to the particular situation at hand.
>
> "So we must move from the major assumption that a jury in this and in all cases can intelligently follow instructions from the Court." (Tr. 2898-2899)

The substance of that trial comment, of course, assumed that the interim instruction, as given, was a proper instruction, and it also assumed that the Court would give additional proper instructions throughout and at the end of the trial of the case. We have considered every charge made and believe that they were proper.

We believe now, as we believed at the time of trial, that the constitutional system of trial by jury is a viable one, even in protracted cases, and that the presumption that juries can and do follow the instructions of the trial judge does not rest upon myth.

The jury returned verdicts of Not Guilty on Counts 14 and 15 (Tr. 7339). We believe a quite convincing argument

could be made that such action is consistent only with the idea that the jury was able to follow, and that it did in fact follow, the instructions given them by the Court. We cannot think of any other reasonable explanation of the jury's action.

After full and careful consideration, we are convinced that the jury was fairly charged in accordance with the law as we understand it, and that the administration of justice requires that we not overturn the verdict of the jury for any of the reasons urged by defendants.

Both in their written brief (page 161) and at post-trial oral argument, defendants suggest that we refused to exercise any judicial discretion in connection with the use of the Grand Jury transcript. When defense counsel at oral post-trial argument suggested that "Your Honor placed it upon us, upon the repeated statement that you didn't have the discretion to go beyond that" (page 30-31 of March 14, 1964 transcript) we suggested that what we thought that what we had said at trial was that "I had discretion but did not choose to exercise it and that . . . resulted in the tentative experiment in this whole area that is fully set out in the record" (page 31 of March 14, 1964 transcript). We further suggested that we had not felt any "strictures in this area" at the time of trial and that we thought that the record would so reflect (page 31 of March 14, 1964 transcript).

Our examination of the trial transcript reflects that our recollection was not inaccurate. When the use of the Grand Jury transcripts came up first (Tr. 422), we heard the arguments of counsel in chambers and then stated our view of the law and the procedure we would follow (Tr. 432-443). The record shows that we then indicated that it was our view that the controlling cases related to the question of whether "a trial judge has abused his discretion" (Tr. 432)

and that we then outlined the procedure that we felt should be followed (Tr. 433-443).

At the time we ruled the first actual use of a Grand Jury transcript we stated that we were "going to experiment with this procedure, which I think is not only approved, but at least by implication recommended" (Tr. 447) and that if "complete fairness is not maintained to all parties" I would later consider determining "a different procedure;" but that, in connection with the first witness, I thought "we would get a bit of experience how it works" (Tr. 448).

We advised counsel that they should "feel perfectly free to renew [their] request for any different procedure" (Tr. 448). We emphasized that we thought that we could "maintain an even keel by experimenting with the present procedure" (Tr. 448). Defendants' counsel, of course, on various occasions throughout the trial, preserved his contention that a defendant has an absolute right to be furnished a copy of the Grand Jury transcript (Tr. 612, 5521, 5590-5591, 6357, and 6362). And on March 11, 1964, a bit late for trial use, counsel filed a supplemental memorandum on the grand jury transcript question.

The supplemental memorandum most recently filed does not cite a single page of the transcript of the trial proceedings. The particular pages of the transcript cited by counsel for the defendant in their regularly filed post-trial briefs do not support defendants' assertion that we believed and acted on the idea that a trial court had no judicial discretion in this area.

Nor do those or any other pages of the transcript indicate that counsel for the defense thought, at the time of trial, that we were under the impression that we lacked discretionary power. We believe that we must rule this case upon what is shown by the record and not on any other basis. We believe the procedure established and followed in regard

to the Grand Jury transcript was fair and within our discretionary power as defined by our controlling courts. We shall not disturb our trial rulings.

Two other paragraphs of defendants' post-trial motions raise questions of alleged error preserved at the time of trial. Both relate to our action in denying motions for mistrial in connection with particular counts of the indictment.

Paragraph 9 of both defendant National's and defendant Wise's motions for mistrial of Count Eleven alleges that we erred in connection with the Adams-Olson conversation related by the witness Adams.

That motion was made the day following our instruction to the jury concerning their duty to disregard Mr. Adams' testimony as to what Mr. Olson had said to him (Tr. 1831-1832). At the time we denied that motion we stated that we were of the opinion that not even a close question of law was presented (Tr. 1840). We are still of that view. We must proceed on the basis that the jury followed our instructions. See *Opper* v. *United States,* 348 U.S. 84, 95 (1954), and *Delli Paoli* v. *United States,* 352 U.S. 232, 242 (1957).

Paragraph A.5 on page 2 of defendant National's motion directed to Counts One and Two alleges that we erred in denying defendants' motions for mistrial. Two such motions were filed. No particular point is made about either in defendants' post-trial briefs but we must discuss both because they do relate to errors claimed at the time of trial and are specified in defendants' post-trial motions.

Defendant National's first motion for a mistrial of Count One was filed in connection with the Chapman Dairy issue. That motion was filed at 1:50 p.m. on Saturday, July 13, 1963, the day following the first discussion of Chapman Dairy.

The first mention of the existence of any problem or real issue concerning Chapman Dairy was made by counsel for the defense at a bench conference on Friday, July 12, 1963 (Tr. 3272-3282). At that time, the case had been in trial for one month and twenty actual trial days had been completed. We denied defendant's motion for mistrial as the first order of business the next Monday morning, July 15, 1963, for the reasons we fully stated of record (Tr. 3427-3454).

Defendants' post-trial briefs do not so much as mention our ruling on that motion. We have, however, reviewed our action denying defendants' first motion for mistrial of Count One and have determined that our ruling was correct.

Defendant National's post-trial briefs do not focus any particular attention on the only other motion for mistrial made in connection with Counts One and Two. That motion for mistrial was made in connection with an incident that occurred in connection with the cross-examination of Government witness Theno. But passing reference is made in defendants' post-trial briefs to the fact that defendant National had even made such a motion (see bottom of page 206 c of defendant National's new trial brief). The legal question of whether we erred in denying that motion is not specifically discussed in defendant National's post-trial brief.

We nevertheless believe it necessary to review the record concerning the Theno incident in somewhat greater detail than we did in connection with the Chapman Dairy problem, because the Theno incident was cited at oral argument as an example of why defendants' post-trial attack upon our fairness should not be considered as "a hindsight, after-the-game-was-over, attack on Your Honor" (page 16 of March 16, 1964 transcript of proceedings).

It is our judgment that a full review of the Theno incident, which was the only instance in which defendants requested any ruling of the trial court during the course of the trial on the basis of any alleged demonstrated prejudice, will also serve a useful introductory purpose for our required discussion of the allegations made in Paragraph 16 of defendant National's post-trial motion.

It must be remembered that counsel for the defense, at oral argument, told us that the Theno incident provided the "best answer" that they could give as to why they did not say anything during the trial about what they say for the first time in their post-trial motions and briefs concerning the allegedly highly prejudicial attitude we allegedly demonstrated against the defendants and defendants' counsel on a daily basis (see pages 16 and 17 of March 14, 1964 transcript). We now review the record concerning the Theno incident.

Mr. Theno was called to the stand as a Government witness (Tr. 3392). Early in his cross-examination, which commenced on page 3408 of the transcript, Mr. Theno was asked if he did not recall being quoted in a trade publication from which counsel commenced to read before the article had been introduced in evidence (Tr. 3410).

Government counsel objected (Tr. 3410). We asked to see a copy of the article which had not been furnished us, (Tr. 3410); we experienced a little difficulty in getting to see it (Tr. 3411); were finally furnished a copy (Tr. 3412); and, as we were looking at the article, counsel continued to talk at each other (Tr. 3412). We therefore instructed counsel for both sides to make their remarks to each other out of the presence of the jury and instructed them to approach the bench (Tr. 3412). By that time it had become apparent that we would once again be required to straighten out another facet of what proved to be about

the only really troublesome evidence problem encountered throughout the trial.

At the bench conference we advised counsel, out of the hearing of the jury, that our "ruling in connection with any effort to use this article stands exactly in the same category as I have attempted to consistently rule in regard to statements attributed to people in newspaper articles, to testimony in a Congressional record, or in any other document other than that which this witness—or, rather the particular witness on the stand, adopts as a statement he made at a particular time" (Tr. 3413-3414). (For instances reflecting earlier instances of the same general problem that had occurred before the Theno incident to which we were then making reference, see Tr. 758; 1170-1173; 1686-1688; 1692-1693; 1917-1919; 1948-1968; 1984-1987 and 2458-2466).

The colloquy at that bench conference (Tr. 3413-3422) reveals that counsel for the defense had intended to do exactly what he did do (Tr. 3417); that he had not visualized that a magazine article fell in the same area as a newspaper article (Tr. 3417-3418); that although we recognized neither side was particularly happy with our general ruling as to how hearsay documents were to be handled (Tr. 3418); we stated that we, nevertheless, "must insist that counsel proceed in accordance—both counsel, on both sides—with the rules that are laid down here" (Tr. 3420).

At that point, counsel for the defense advised us for the second time that day that he did not feel well and requested that we consider recessing until Monday (Tr. 3420; see Tr. 3421 for reference to the earlier request). We adjourned court until Monday (Tr. 3422).

On the following Monday, after we had ruled on two defense motions, one filed at 1:50 p.m. on the preceding Saturday, and the other filed at 9:10 a.m. on that day

(Tr. 3427-3454), Mr. Theno was recalled for further cross-examination (Tr. 3455). The magazine article was mentioned briefly on pages 3455-3456 of the transcript but inquiry into the detail of the article was not recommenced until page 3481 of the transcript. Examination concerning the article continued without incident up to page 3488 of the transcript. During that time the witness testified that a portion of the article did in fact refresh his recollection (Tr. 3484). Only three objections had been made by the Government during all of witness Theno's Monday morning cross-examination; we had over-ruled two and sustained one (Tr. 3461, 3463, 3482).

On page 3488, Mr. Theno was asked "Are you saying the article is wrong?" He answered: "I am saying I cannot be sure." Defense counsel then stated and asked:

> "Q. You can't remember. There was no reason at that time for you to tell this reporter, Mr. Leathers, the absolute truth about these matters, was there, Mr. Theon?"

The following then occurred:

> "MR. JINKINSON: Objected to, Your Honor, as being irrelevant and immaterial.
>
> MR. CHADWELL: [Mr. Purcell, not Mr. Chadwell, was conducting the cross-examination] Is counsel taking the position it is irrelevant whether he told the truth or not?
>
> MR. JINKINSON: I don't think, Your Honor—Mr. Chadwell knows that is not what I mean. That is improper.
>
> THE COURT: I will sustain the objection. You can ask him, Mr. Purcell, specifically as to any disagreement he may have, but this witness hasn't testified any differently than he has testified generally, and he admitted very freely that this has refreshed his recollection in particular instances.
>
> MR. PURCELL: I would like to approach the Bench, if Your Honor please." (Tr. 3488-3489)

At the bench conference, and out of hearing of the jury, the following took place:

"MR. PURCELL: I object to the remarks of the Court as unduly restricting the effect of my cross examination of this witness. I object to the Court in the presence of the jury characterizing this man's testimony. Perhaps the Court believes that the cross examination is ineffectual, it hasn't proved anything, that it hasn't proved inconsistent statements, but this is a hostile witness.

I think it is improper for the Court to vouch for this witness in the presence of the jury, to say to the jury, 'This man very fairly' stated this and that, that he has not said anything inconsistent with what appears in the article.

I think it is prejudicial to the defendant and I think it is highly improper for the Court, as the Court has done, to belittle our attempt at cross examination of hostile, adverse witnesses, and in the manner in which it was said to me.

If I had any effect on this cross examination, I submit the Court has discredited it.

THE COURT: Mr. Purcell, would you like for me to advise the jury at this point that what the Court says in sustaining or not sustaining an objection is not to be considered nor does it reflect any view I have as to this witness' testimony, and that the testimony of this witness must be judged and appraised by the jury?

I will be happy to give you that charge at this time if you want it, if it is your judgment that this would reflect adversely on what was—

MR. PURCELL: I think Your Honor's remarks clearly washed out the cross examination.

THE COURT: Let me know what you would like for me to do. Would you like for me to so advise the jury? I would be happy to do so.

MR. PURCELL: Yes, that is the least that should be done.

THE COURT: Very well, I will do that right now. (Tr. 3489-3491)

We then immediately instructed the jury as follows:

"THE COURT: Members of the jury, in connection with the exchange between Court and counsel, as evidenced just now, as is true in regard to any statement that the Court makes in ruling an objection by counsel for either side, you are again instructed, and you will be instructed still again in my final charge, that what the Court may say in connection with ruling an objection is not in any way to be taken as reflecting any view of a particular witness' testimony, and I will charge you again and reiterate throughout this trial that the judgment of the weight of the evidence and the credibility that you give a particular witness' testimony is your province alone, and not the Court's, and you are not to assume from anything that the Court may say in ruling objections, by any counsel, and particularly the objection that I have just now ruled, that I intend in any way to reflect any view as to what weight, what credibility, you should give to Mr. Theno, in particular, or any other witness in general.

Keep that in mind in connection with all witnesses and keep it in mind as far as Mr. Theno's testimony is concerned.

You may proceed, Mr. Purcell." (Tr. 3491-3492)

After that instruction, the cross-examination of Mr. Theno continued (Tr. 3492) and was concluded without incident (Tr. 3505); defense counsel made inquiry about several other statements quoted directly from the article (Tr. 3492 to 3496); the article was admitted in evidence over the Government's objection (Tr. 3496); the witness was turned back to the Government for re-direct examination (Tr. 3496); and after being passed back and forth for additional questions by both sides, was excused (Tr. 3505). Witness Sheehan was then called by the Government and his direct examination was completed before the noon recess.

After lunch, and at the start of the afternoon session, defense counsel, for the record, moved for a mistrial as to Counts One and Two, which we denied (Tr. 3538-3539).

When we inquired of defense counsel at oral argument as to why they did not say something at the time of trial about what they now say was our almost daily attitude "towards the defendants, the defense, our theories, and counsel during the trial" (page 16 of March 14, 1964 transcript), our question was answered by defense counsel's question: "What could we do about it?"

We suggest that the language used by counsel in the motion for mistrial of Counts One and Two in connection with the Theno incident could have been used during the trial as a model for motions that could have been filed in connection with other counts in the indictment to preserve any contention that we were almost daily reflecting an attitude of prejudice against defendants and their counsel.

Defendants' motion for mistrial of Counts One and Two made after the noon recess and our ruling on the motion made at that time reads as follows:

"MR. PURCELL: Mr. Jinkinson, Your Honor, may we approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. PURCELL: Come now the Defendants and move for a—

THE COURT: Pardon me, would you let Mr. Purcell stand here?

MR. PURCELL—for a mistrial as to Counts 1 and 2 of the indictment because of the comments made by the Court during the cross-examination of the witness Theno. By so commenting, the Court, we feel, practically removed from the jury's consideration the question of whether or not this witness was telling the truth as to matters crucial to the question of defendants' guilt or innocence. In so commenting, we believe that the Court usurped its function in the trial of this case, which is to act as an impartial arbiter. We state that we are fully mindful of the fact that lay

jurors are duly and properly impressed by the comment and attitude of the trial judge, particularly in the Federal Court, and we further state that the comments of the Court prejudiced the defendant and such prejudice has not and cannot be removed by any cautionary instruction given to the jury by the Court.

MR. JINKINSON: I think it sounds like the same motion made this morning, only know it was made after the Court gave the cautionary instruction which the Court asked if counsel wanted. Counsel wanted it and the Court gave it to him. I don't see how the instruction could be any more fair than it was and certainly it didn't help the Government any, I will say that. The Government was objecting to it because counsel wanted it.

THE COURT: Well, I don't think it is any waiver of the point this morning, although I will overrule the motion."

We think the foregoing review of the record states the detail of the Theno incident from beginning to end.

On the basis of that review and our personal recollection of the Theno incident at the time of trial, we do not believe we erred in refusing defendants' motion for a mistrial of Counts One and Two.

Nor do we think that the Theno incident adds any weight to defendants' blanket attack upon this Court, the matter to which we now turn. We refer, of course, to the allegations contained in paragraph 16 of defendant National's motion.

Counsel for the defendants have made clear that in making their post-trial charge that our consistent attitude was highly prejudicial to the defendants they "do not contend that the Court intended to prejudice the defendants during the course of the trial"; they suggest that they "are certain that the Court felt that he was impartially presiding over the trial of this case" (page 201 of defendants' new trial brief). At the time of oral argument, in somewhat similar fashion, Mr. Chadwell opened his argument with the following statement:

> "I want to repeat very sincerely, Your Honor, what Mr. Purcell has said, that is, by anything that we have said in our briefs or anything that he has said or anything I will say, we want to make very clear in the record that we do not wish Your Honor to understand that we are in any way indicating a belief that Your Honor was other than sincere and honest in your rulings from beginning to end in this trial. We don't think that at any time you were out to get us or out to get the defendants, but you tried to preside in this case fairly. We don't say anything else, and I want the record to make that clear." (Page 17 of March 14, 1964 transcript)

Defendants do not attempt to cite the transcript as to when and where the alleged instances of unintentional but nevertheless demonstrated prejudice were supposed to have occurred on "practically every trial day" (see page 203 of defendants' new trial brief). But counsel's reiteration at oral argument makes clear that their assertion that "there wasn't a day that we went back to our office that we didn't feel—just didn't feel good about the treatment that we were getting here . . ." (page 16 of March 14, 1964 transcript) was not a slip of the pen.

To further complicate the problem of making any adequate review of the record, defendants state that the isolated portions of the record that they did quote in their post-trial briefs are "only illustrative, and not all-inclusive" (page 201 of defendants' new trial brief). We had no way of knowing during the trial that counsel felt as they now say they felt on practically every day of the trial. And, even after trial, we cannot guess what other alleged incidents are in their mind.

In raising the question presented by paragraph 16 for the first time after the trial was over, defendants state that "the comments and rulings of the court when viewed piecemeal might not appear to be prejudicial" (page 203 of defendants' new trial brief). But, defendants suggest that "when the cumulative effect is considered; when it is rec-

ognized that on practically every trial day an incident occurred, the jury necessarily received the impression that the court's attitude was adverse toward the defendants" and that "it is apparent that defendants were prejudiced and that they did not receive a fair trial" (page 203 of defendants' new trial brief).

The mere statement of defendants' post-trial position in regard to our allegedly prejudicial attitude makes it obvious that it is as difficult to come to grips with defendants' generalized blanket charge as it is to try to pick mercury from a broken thermometer off a tile floor.

The mere fact, however, that the defendants remained silent during the trial does not make it unnecessary for us to rule the question raised by paragraph 16 of National's motion and the other paragraphs of both motions that repeat that allegation.

The trial court in this case, as in any other case, is under duty to rule definitively on every point raised in a post-trial motion so that the appellate court neither has to guess nor search the record on its own account in order to ascertain what and why the trial court either sustained or denied any particular contention made by either party at or after trial.

Isolated portions of this record may not reasonably be read in support of any thought that this Court, either during the trial or at the present time, thought that it was being subjected to what Botein described as "The Gentle Art of Judge-Baiting", 29 N.Y. State Bar Bulletin 115 (I am indebted to Judge Herlands for the phrase and citation. See footnote 25 on page 175 of the panel discussion reported in 34 F.R.D.)

When the trial was quite well along, counsel for both sides led the Court to believe that it had not displayed any objective evidence of irritation toward either side in the case up to that point.

On June 27, 1963, one of counsel for the defense wanted to express his unhappiness with Government counsel and asked to approach the bench (Tr. 1672). After some not unheated discussion between counsel, defense counsel indicated that he also thought that we had shown "a good deal of irritation because we [defense counsel] were making the objection, and I think it is prejudicial to these defendants." (Tr. 1673)

We then made the following statement and request to counsel for both sides:

> "THE COURT: The record will show what it states. As far as any evidence of irritation, I think that is rather a broad statement. I am not irritated with counsel in this instance, nor have I been irritated at counsel in any other instance, and if counsel for either party feel that the Court has given any objective evidence of irritation at any place throughout this trial, I wish they would state it in the record right at this time as to where it happened."

Neither counsel made any response to that request either then or at any other time before the jury returned its verdict. We ordered the trial to proceed (Tr. 1673).

At the time of trial we stated that we did not believe that the failure of defense counsel to respond as fully and as promptly to our repeated requests to be furnished the authorities upon which they were relying in regard to their particular legal theories evidenced any effort on the part of defense counsel "to mousetrap the Court" (Tr. 1438). (See, for particular examples of our requests for authorities, Tr. 854, 907, 943, 989, 1152, 1462, 1464, 1845-1846, 2066, 2379, 2625-26, 2954-55, 3083-3089, 3862, 4428-4429 and 5093. See also the pages of the transcript cited in connection with our discussion of our charge to the jury for examples of the separate requests made in that regard).

This is not to say counsel ceased to be vigorous in their representation of their respective clients, or that they gave the slightest evidence of being intimidated by the "great

authority" of a federal judge (Cf. defendants' oral argument on page 17 of the March 14, 1964 transcript). Nor is it to say that this lawsuit was completely free of all heat and friction (on one occasion we spoke quite plainly to counsel for both sides (Tr. 1963-1964)). Nor is it to suggest that there were not some further occasions when four counsel, two from each side, were on their feet at the same time (Tr. 6385-6386).

But it is to say that one does not get a fair picture of how the trial of this case was conducted by viewing isolated and piecemeal occurrences as a general pattern that established the overall atmosphere of the trial. For example, we do not believe that Mr. Jinkinson's declared willingness to risk jail (Tr. 3142); or Mr. McLaren's not unheated suggestion to Mr. Jinkinson of "Don't talk to me like that" (Tr. 5984); or Mr. Jinkinson's suggestion that "the record should show there is no necessity of your [Mr. Purcell's] snarling at me . . . as you frequently do in this lawsuit" (Tr. 5306) were anything other than exceptional instances of counsel's expressions of tension and that such examples in no way reflect a fair picture of how counsel consistently treated each other or the Court.

We, of course, reached points in this case where further discussion among counsel, in our judgment, was producing "more heat between counsel than light to the Court" (Tr. 5988), but the rule in the trial of this case was that even when counsel sometimes commenced a conference in chambers with the Court in something other than the best of spirits (see page 3227 of the transcript for an example), they were consistently willing to try again and again to agree upon procedures that would simplify the trial of the case (see pages 3240-3246 of the transcript for the actual accomplishments of the conference that commenced under somewhat cloudy skies on page 3227 of the transcript).

We recognize that counsel for the defense had and have a job to perform. In a sense, a general post-trial charge

that the defendants were substantially prejudiced and deprived of a fair trial by the comments and rulings of the trial court, by alleged restrictions placed upon defendants' cross-examination and their presentation of evidence, and by the trial court's alleged adverse attitude toward the defendants, defendants' evidence and defendants' counsel, about all of which defense counsel, with one exception (the Theno incident), remained silent throughout the trial, could be said to be an attack upon the judicial integrity of the Court itself. We do not so view it.

Every justice or judge of the United States, before entering upon the performance of the duties of his office, swears or affirms that he "will administer justice without respect to persons, and do equal justice to the poor and to the rich, and that [he] will faithfully and impartially discharge and perform all the duties incumbent upon [him] according to the best of [his] abilities and understanding, agreeably to the Constitution and laws of the United States" (28 U.S.C.A., § 453).

Strictly speaking, we think it is technically correct to suggest that there is no occasion for us to state of record that we did not intentionally violate that ancient oath. We are not charged with any intentional wrong-doing. But defendants' blanket post-trial attack is so blurred and generalized that we feel that the record should reflect that we believe that we complied fully, in letter and in spirit, with the obligation that we undertook when we became a judge of this Court.

Under our system of administration of justice, it is my duty to rule definitely on all allegations contained in any motion for new trial. Accordingly, on the basis of the record and our personal observation of the trial, we find and determine that the defendants were not substantially prejudiced, nor were they deprived of a fair trial by reason of any comment or ruling made by us during the trial; we further find and determine that no unreasonable or pre-

judicial restrictions were placed on defendants' cross-examination or on their presentation of evidence on their behalf; and we further find and determine that the transcript of the proceedings in this case demonstrates that our attitude during the trial toward the defendant, defendants' evidence and defendants' counsel was one consistent with the obligations imposed by our oath of office.

We further state that we have restudied the entire transcript as a whole and that we have particularly studied the portions of the transcript that immediately preceded and followed the isolated portions quoted in defendants' brief. Such study and reconsideration and our recollection of the trial itself convinces us that it can not fairly be said that defendants' arguments in regard to our alleged demonstrated prejudicial attitude are in any degree tenable. We so find and determine.

We finally state and determine that we have not deemed it necessary to discuss any of the alleged instances of demonstrated prejudice other than the Theno incident for the reason that no trial relief was either requested or denied at the time of trial in connection with any of those matters. We think it obvious that individual discussion of such alleged instances would be fruitless because defendants have seemingly held in reserve other instances to which they may desire to direct the attention of the appellate courts (see page 201 of defendant National's new trial motion where it is stated that the alleged instances presented for our consideration, even after trial, are only illustrative and not all-inclusive).

For the reasons stated, defendants' pending motions should be and are hereby denied.

IT IS SO ORDERED.

JOHN W. OLIVER
District Judge

Kansas City, Missouri
May 28, 1964

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NATIONAL DAIRY PRODUCTS CORPORATION,
Defendant.
No. 20542

JUDGMENT

On this 22nd day of June, 1964, came the attorney for the government and the defendant, National Dairy Products Corporation, appeared by counsel.

It is adjudged that the defendant has been convicted upon its plea of not guilty, by a verdict of guilty, by a jury, on August 16, 1963, of the following offenses:

> Conspiring in restraint of trade to fix the in-store prices of milk and to eliminate competition in the sale of milk, as charged in Counts 1, 3, 5, 7 and 9, in violation of Section 1, Title 15, United States Code; and,
>
> Conspiring in restraint of trade to eliminate price competition in the sale of milk, as charged in Counts 11 and 12, in violation of Section 1, Title 15, United States Code; and
>
> Selling milk at unreasonably low prices for the purpose of destroying competition, as charged in Counts 2, 4, 6, 8, 10 and 13, in violation of Section 13(a), Title 15, United States Code;

and the Court, having asked the defendant whether it has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant, National Dairy Products Corporation, is assessed a fine of Fifty Thousand Dollars ($50,000.00) on each of Counts 1, 3, 5, 7, 9, 11 and 12; and, a fine of Five Thousand Dollars ($5,000.00) on each of Counts 2, 4, 6, 8, 10 and 13; for a total fine in the sum of Three Hundred Eighty Thousand Dollars ($380,000.00).

It is further ordered that a stay of execution be granted on the judgment imposed herein, in the event an appeal is taken, until after the final determination of this cause on appeal.

IT IS SO ORDERED.

/s/ JOHN W. OLIVER
District Judge

Dated: June 22nd, 1964

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1962

UNITED STATES *v.* NATIONAL DAIRY PRODUCTS CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 18. Argued March 21, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued December 5, 1962.—Decided February 18, 1963.

(372 U. S. 29)

MR. JUSTICE CLARK delivered the opinion of the Court.

This case involves the question whether § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, making it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," is unconstitutionally vague and indefinite as applied to sales made *below cost* with such purpose. National Dairy and Raymond J. Wise, a vice-president and director, upon being charged, *inter alia*, with violating § 3 by making sales below

cost for the purpose of destroying competition, moved for dismissal of the Robinson-Patman Act counts of the indictment on the ground that the statute is unconstitutionally vague and indefinite. The District Court granted the motion and ordered dismissal. On direct appeal under the Criminal Appeals Act, 18 U.S.C. § 3731, we noted probable jurisdiction, 368 U.S. 808, because of the importance of the issue in the administration of the Robinson-Patman Act. We have concluded that the order of dismissal was error and therefore remand the case for trial.

I.

National Dairy is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States. Through its processing plant in Kansas City, Missouri, National Dairy has for the past several years been in competition with national concerns and various local dairies in the Greater Kansas City area and the surrounding areas of Kansas and Missouri. In the Greater Kansas City market National Dairy distributes its products directly, but cities and towns in the surrounding Kansas and Missouri areas outside this market are served by independent distributors who purchase milk from National Dairy and resell on their own account.

The indictment charged violations of both the Sherman Act, 15 U.S.C. § 1, and the Robinson-Patman Act in Kansas City and in six local markets in the adjacent area.[1] The

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1. Seven counts of the 15-count indictment charged violations of § 3 of the Robinson-Patman Act. The Sherman Act and Robinson-Patman Act counts relate to the same course of conduct.

One Robinson-Patman count, number 13, charges Raymond J. Wise, a vice-president and director of National, with authorizing National's pricing practice and ordering its effectuation in the Kansas City market. *United States* v. *Wise*, 370 U. S. 405 (1962), involves two Sherman Act counts of the indictment which named Wise as a defendant.

Robinson-Patman counts charged National Dairy and Wise with selling milk in those markets "at unreasonably low prices for the purpose of destroying competition." Further specifying the acts complained of, the indictment charged National Dairy with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it . . . by intentionally selling milk [directly or to a distributor] at prices below National's cost." In five of the markets National Dairy's pricing practice was alleged to have resulted in "severe financial losses to small dairies," and in two others the effect was claimed to have been to "eliminate competition" and "drive small dairies from" the market.

National Dairy and Wise moved to dismiss all of the Robinson-Patman counts on the grounds that the statutory provision, "unreasonably low prices," is so vague and indefinite as to violate the due process requirement of the Fifth Amendment and on indictment based on this provision is violative of the Sixth Amendment in that it does not adequately apprise them of the charges. The District Court after rendering an oral opinion holding that § 3 of the Robinson-Patman Act is unconstitutionally vague and indefinite, granted the motion and ordered dismissal of the § 3 counts. The case came here on direct appeal from the order of dismissal.

II.

National Dairy and Wise urge that § 3 is to be tested solely "on its face" rather than as applied to the conduct charged in the indictment, *i. e.*, sales below cost for the purpose of destroying competition. The Government, on the other hand, places greater emphasis on the latter, contending that whether or not there is doubt as to the validity of the statute in all of its possible applications, § 3 is plainly constitutional in its application to the conduct alleged in the indictment.

It is true that a statute attacked as vague must initially be examined "on its face," but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination.

We do not evaluate § 3 in the abstract.

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented. We might add that application of this rule frees the Court not only from unncessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *United States* v. *Raines,* 362 U. S. 17, 22 (1960).

The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E. g., Jordan* v. *De George,* 341 U. S. 223, 231 (1951), and *United States* v. *Petrillo,* 332 U. S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E. g., United States* v. *Rumely,* 345 U. S. 41, 47 (1953); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); see *Screws* v. *United States,* 325 U. S. 91 (1945).

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harriss,* 347 U. S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with

which a defendant is charged. *Robinson* v. *United States*, 324 U. S. 282 (1945). In view of these principles we must conclude that if § 3 of the Robinson-Patman Act gave National Dairy and Wise sufficient warning that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them.[2] This is not to say that a bead-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage. We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that selling "below cost" with predatory intent was within its prohibition of "unreasonably low prices."

III.

The history of § 3 of the Robinson-Patman Act indicates that selling below cost, unless mitigated by some acceptable business exigency, was intended to be prohibited by the words "unreasonably low prices." That sales below cost without a justifying business reason may come within the proscriptions of the Sherman Act has long been established. See, *e. g.*, *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911). Further, when the Clayton Act was enacted in 1914 to strengthen the Sherman Act, Congress passed § 2 to cover price discrimination by large companies which compete by lowering prices, "oftentimes below the cost of production . . . with the intent to destroy and make unprofitable the business of their competitors." H. R. Rep. No. 627, 63d Cong., 2d Sess. 8. The 1936 enactment of the Robinson-Patman Act was for the purpose of "strengthening the Clayton Act provisions," *Federal Trade Comm'n* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 544 (1960), and the

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2. It should be noted that, in reviewing a case in which a motion to dismiss was granted, we are required to accept well-pleaded allegations of the indictment as the hypothesis for decision. *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 343 (1952).

Act was aimed at a specific weapon of the monopolist—predatory pricing. Moreover, § 3 was described by Representative Utterback, a House manager of the joint conference committee, as attaching "criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act." 80 Cong. Rec. 9419.

This Court, in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954), a case based in part on § 3, recognized the applicability of the Robinson-Patman Act to conduct quite similar to that with which National Dairy and Wise are charged here. The Court said, "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through programs in which "profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Id.*, at 120, 119.

In proscribing sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" we believe that Congress condemned sales made below cost for such purpose. And we believe that National Dairy and Wise could reasonably understand from the statutory language that the conduct described in the indictment was proscribed by the Act. They say, however, that this is but the same horse with a different bridle because the phrase "below cost" is itself a vague and indefinite expression in business.

Whether "below cost" refers to "direct" or "fully distributed" cost or some other level of cost computation cannot be decided in the abstract. There is nothing in the record on this point, and it may well be that the issue will be rendered academic by a showing that National Dairy sold below any of these cost levels. Therefore, we do not reach this issue here. As we said in *Automatic Canteen Co.* v. *Federal Trade Comm'n*, 346 U. S. 61, 65 (1953): "Since precision of expression is not an outstanding char-

acteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings."

Finally, we think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws* v. *United States,* 325 U. S. 91 (1945), in which a requirement of intent served to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.,* at 102; see *id.* at 101-107. Proscribed by the statute in *Screws* was the intentional achievement of a result; *i. e.,* the willful deprivation of certain rights. The Act here, however, in prohibiting sales at unreasonably low prices for the purpose of destroying competition, listed as elements of the illegal conduct not only the intent to achieve a *result*—destruction of competition—but also the *act*—selling at unreasonably low prices—done in furtherance of that design or purpose. It seems clear that the necessary specificity of warning is afforded when, as here, separate, though related, statutory elements of prohibited activity come to focus on one course of conduct.

United States v. *Cohen Grocery Co.,* 255 U. S. 81 (1921), on which much reliance is placed, is inapposite here. In *Cohen* the Act proscribed "any unjust or unreasonable rate or charge." The charge in the indictment was in the exact language of the statute, and, in specifying the conduct covered by the charge, the indictment did nothing more than state the price the defendant was alleged to have collected. Hence, the Court held that a "specific or definite" act was neither proscribed by the Act nor alleged in the indictment. *Id.,* at 89. Moreover, the standard held too vague in *Cohen* was without a meaningful referent in business practice or

usage. "[T]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute. . . ." *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 240-241 (1925). In view of the business practices against which § 3 was unmistakably directed and the specificity of the violations charged in the indictment here, both absent in *Cohen*, the proffered analogy to that case must be rejected.

In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940); *NAACP* v. *Button*, 371 U. S. 415. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. We are thus permitted to consider the warning provided by § 3 not only in terms of the statute "on its face" but also in the light of the conduct to which it is applied. The reliance of National Dairy and Wise on First Amendment cases is therefore misplaced.

IV.

This opinion is not to be construed, however, as holding that every sale below cost constitutes a violation of § 3. Such sales are not condemned when made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor. 80 Cong. Rec. 6332, 6334; see *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481 (C. A. 10th Cir. 1957). Sales below cost in these instances would neither be "unreasonably low" nor made with predatory intent. But sales made below cost without legitimate commercial objective and with specific intent to de-

stroy competition would clearly fall within the prohibitions of § 3.

Since the indictment charges the latter conduct and, as noted, *supra*, n. 2, we are bound by the well-pleaded allegations of the indictment, we must conclude that National Dairy and Wise were adequately forewarned of the illegal conduct charged against them and remand the case for trial. Our holding, of course, does not foreclose proof on the merits as to the reasonableness of the alleged pricing conduct or, for that matter, the absence of the predatory intent necessary to conviction.

Reversed and remanded.

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG join, dissenting.

The statute here involved makes it a crime to sell "goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 15 U. S. C. § 13a. In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921), this Court held unconstitutional and void for vagueness a statute which made it a crime "for any person willfully . . . to make any unjust or unreasonable rate or charge" in dealing in or with any necessaries. The rule established by that case has been often followed,[1] is in my judgment sound, and should control this case. Accordingly, I would affirm the District Court's judgment holding the statute invalid. The Court here attempts by interpretation to substitute unambiguous standards for the vague standard of "unreasonably low prices" used by Congress in the statute. It seems to me that if this criminal statute is to be so drastically reconstructed it should be done by Congress, not by us. Moreover, I agree with the Attorney General's National Committee to Study the Antitrust Laws, which concluded:

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1 *E. g., Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); cf. *United States* v. *Cardiff*, 344 U. S. 174 (1952).

"Doubts besetting Section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law."[2]

APPENDIX B

This appendix sets forth the text of Rule 6(e) of the Rules of Criminal Procedure for the United States District Courts (18 U.S.C.) and pertinent portions of Sections 2(a) and 2(b) of the Clayton Act, 38 Stat. 730 (1914), as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(a) and 13(b).

Rule 6(e) of the Rules of Criminal Procedure for the United States District Courts

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

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2. Atty. Gen. Nat. Comm. Antitrust Rep. 201 (1955) (recommending repeal of § 3).

Sections 2(a) and 2(b) of the Clayton Act, as Amended

Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provide in pertinent part as follows:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .
>
> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ."

APPENDIX C

Set forth below are excerpts from the record showing the manner in which grand jury transcript was utilized by Government counsel in the attempted refreshment of various witnesses, the character of the testimony so elicited, and the motions by petitioner to inspect the portions so used, and other portions on the same subject matter, all of which were denied.

Testimony excerpted is from direct examination except as otherwise indicated.

For the convenience of the Court, we have included a Glossary of Names, identifying the witnesses, and other persons whom they mentioned, by job title and employer. We have also described in the margin at certain points the particular issues under the indictment as to which the witnesses were being questioned.

Glossary of Names*

Witnesses	Appendix Pages
John Flanagan Sealtest General Sales Manager	75
Vincent Crimmins Fairmont Foods Co., Country Club Dairy former Sales Manager	104
Edward Gilmore Hawthorn-Mellody Dairy former Sales Manager	111
Arthur Augenstein Borden General Manager	123
Frank Gardner Assistant to Raymond Wise, Vice President in charge of Sealtest Central Division, Chicago	156

* Persons identified had offices in Kansas City unless otherwise noted.

John Baird 170
Sealtest Milk Sales Manager
David Stewart 175
Sealtest General Manager

Persons Mentioned In Extracted Testimony

William Callender
Foremost Division Manager
Erhard Edquist
Fairmont Foods Co.
Vice President, Omaha
Jack Felts
Borden Sales Manager
J. M. O'Bryan
Foremost General Manager
Jack Pentz
Borden Division Manager
Columbus, Ohio
Carl Peterson (deceased)
Fairmont Foods Co., former
Country Club Dairy General Manager
Raymond Wise
Vice President of Petitioner in
Charge of Sealtest Central
Division, Chicago
Paul Young
Hawthorn-Mellody Dairy,
Chicago, Vice President

Attorneys for the Parties

Messrs. Jinkinson, Hernacki, Eisen, Howard and Mann were attorneys representing the Government. Messrs. Chadwell, McLaren, Lashly and Purcell were attorneys representing defendants.

JOHN FLANAGAN
Sealtest General Sales Manager

(R. 417)

Q. Mr. Flanagan, on or about September 10, 1957, were you present at a meeting held in Chicago, Illinois, in Mr. Wise's office at which were present Mr. Wise, Mr. Gardner, Mr. Stewart, Mr. Pentz and Mr. Augenstein?

A. Yes, sir, I was.

(R. 419-421)

Q. Now, at this time, was anything said about this Hawthorn-Mellody discount offer?*

A. They asked if we were aware that there was an offer to the Milgram Company, and certainly we said we were.

Q. Did Mr. Wise have a copy of this discount offer which you had obtained?

A. I don't know if he had a copy or not, sir, I don't know whether he did or not.

Q. What was said by each of the parties about the offer?

A. Well, Mr. Wise certainly said that we were quite concerned about it, but that was about the sum total of the conversation in regards to our knowing the Hawthorn-Mellody offer.

Q. Was anything further said about the offer or about doing something about that offer?

A. No, sir, there wasn't.

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* An alleged objective of the claimed conspiratorial price war charged under Count 11 was to compel Hawthorn-Mellody to withdraw its discount offer to the Milgram chain. Petitioner contended that it initiated a 4¢ per half-gallon price reduction entirely independently, and a Government exhibit, a contemporaneous report by a Sealtest auditor, stated that the reason therefor was "[b]ecause milk in gallon jugs ha[d] been selling at exceptionally low prices" (GX 77). Other evidence showed that gallon jugs had been priced 13¢ below two Sealtest half-gallon cartons in the stores, and 23¢ below home delivery (R. 5182-83, 6124-25).

Q. Can you think real hard, Mr. Flanagan, and see if you can remember anything further said about what should be done about this offer?

A. There was nothing said as to what would be done about it. We were vitally concerned about it as well as apparently they were, too. But as to what to do about it, there was nothing said about this at all.

Q. Was Mr. Wise of a view that the prices should drop in the community?

A. No, sir.

Q. Did Mr. Pentz say anything about going to see Mr. Young or Hawthorn-Mellody, either one, to ask them to withdraw the discount?

A. No, sir. This was not said.

Q. I am not limiting myself, you understand, Mr. Flanagan, to that particular language, but did he just in any way express any words which would convey that thought?

A. Well, certainly not to my knowledge, anything that I heard, was there any inference or reference made to what you stated.

Q. Do you recall, Mr. Flanagan, Mr. Pentz asking Mr. Wise if he would go with him to see Mr. Young to get him to withdrawn the discount?

A. Mr. Pentz asked Mr. Wise to accompany him to lunch with Mr. Paul Young.

Q. And did he state what the purpose would be in asking him to come along with them?

A. No, sir, he did not.

Q. Didn't he say that he would ask them to withdraw the offer?

A. No, sir, he did not.

(THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN COURT CHAMBERS, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

(R. 441-442)

MR. JINKINSON: If this is all right with the Court, we make this suggestion, that we mark in red that portion of the grand jury transcript that we would like to read to the witness to refresh his memory. In black, all—that would be the additional testimony. They have two marks, black and red. Red means to refresh his recollection. Black means this is additional testimony on the same subject.

THE COURT: Yes, I would also like to make this suggestion and I think it would flow much easier, that you pay particular attention to framing your question in substantially the same sense, if not in the same language.

(R. 447)

MR. CHADWELL: Your Honor, I move for the privilege of examining the portions of the transcript which Mr. Jinkinson has marked and submitted to Your Honor.

THE COURT: The Court is going to deny that at this time, Mr. Chadwell.

(R. 448)

MR. CHADWELL: I just want to point out to Your Honor that, of course, I do not know what the transcript reveals, and if I did know, I think, would make it easier for me to handle any questions that might be asked or handle any cross-examination on this point. I do not know whether that will be necessary or not, of course, at this time.

THE COURT: I understand your dilemma perfectly, but I think we maintain an even keel by experimenting with the present procedure at this time, and I assure counsel on both sides that I will follow on the testimony very carefully.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

(R. 452-456)

Q. Mr. Flanagan, I am going to read—strike that—did you testify before the Federal Grand Jury here in Kansas City on or about October 21st, 1958?

A. Yes, sir, I did.

• • •

Q. I am going to read to you some questions and answers and I will ask you to listen to them carefully and then I will ask you some questions about it, sir.

• • •

Q. "QUESTION: When did that take place?" This is now in reference to the September, 1957, meeting in Chicago in Mr. Wise's office which you were discussing at the end of your testimony, sir.

• • •

"ANSWER: That took place in Mr. Wise's office in Chicago."

"QUESTION: About what time, when?"

"ANSWER: Early fall of"—

MR. CHADWELL: Will you go a little slower? I don't have the privilege of a copy of this.

"ANSWER: Early fall of 1957."

• • •

Q. "ANSWER: And in that meeting, Mr. Stewart asked if I would accompany him to Chicago for a meeting with Mr. Wise and Mr. Gardner and when I arrived there, Mr. Pentz of Borden's and Art Augenstein of Borden's were there in the office, and I don't remember the specific conversation as to who said what, the general conversation, but Mr. Pentz had asked Mr. Wise to accompany him, and see Paul Young of Hawthorn-Mellody Company to ask him to withdraw the 13 per cent offer to Milgram's, and Mr. Wise was very emphatic in saying he certainly would not, and it disturbed him very much that Pentz would even ask him to do that, and that was about the essence of that meet-

ing. It wasn't a very long meeting and it broke up. This was prior to our meeting the competitive situation with the Milgram's Company so that would be in line with your thinking a while ago that no doubt the Borden Company had to meet the situation the same as we would have to meet it."

Were you asked those questions at that time and did you give those answers, sir?

A. Yes, apparently this is what I said. This is what you read from my testimony.

Q. Does that refresh your recollection in any respect as to what Mr. Pentz said to Mr. Wise on that occasion?

A. Well, the question I have in my mind—I am not certain I recall Mr. Pentz' making a direct reason why they were having lunch, I don't know that this was the statement that was made at all. I don't recall this.

• • •

THE COURT: Had you completed your answer?

THE WITNESS: Only that I do want to be certain that I am not just real sure that I heard Mr. Pentz say. I think possibly that I have—since we were all so conscious of this very drastic offer by the Hawthorn Company to the Milgram Company, a customer of ours that represented some 40 per cent of our wholesale business. I think I was so conscious of it that I may have assumed that this is what he had in mind, so that is the best way I could state it and the most factual way I could state it.

THE COURT: Let me ask you whether your prior testimony to the effect that Mr. Pentz had asked Mr. Wise to accompany him and see Paul Young of the Hawthorn-Mellody Company to ask him to withdraw the 13 per cent offer to Milgram's presently recalls to your mind what happened at this meeting and whether you can presently testify that Mr. Pentz did so ask Mr. Wise to call upon Mr. Young to withdraw the 13 per cent offer?

THE WITNESS: Well, sir, I just couldn't be positive that I can recall even hearing Mr. Pentz say his reason for

going. I do recall him asking Mr. Wise to accompany him, I do recall Mr. Wise saying emphatically no, that he didn't want to do a thing of this kind, didn't want to have lunch with him, and that is the best of my recollection.

THE COURT: Do you recall the substance of what you now recall revolved around the 13 per cent offer to Milgram, that that was the subject of the conversation?

THE WITNESS: Well, sir, there was an offer made. It was around that subject and that is why I was so conscious of it, I am sure, and the whole flavor of the whole meeting was the very consciousness of this very serious matter, so I very possibly could have assumed this rather than actually hearing it, for I don't recall of actually hearing the statement made for any particular reason other than to have lunch.

THE COURT: Very well, you may proceed, counsel.

(R. 463-464)

Q. May I ask you this: At this meeting, now, in '57, again, is it not a fact, Mr. Flanagan, that at that meeting, Mr. Wise thought the best way to meet these problems which he discussed and you have related, was to lower prices and Mr. Pentz of Borden said, "I will try to get Mr. Young to withdraw it," that was his solution, isn't that the case?

A. No, sir, that is not the case, Mr. Hernacki, that is not the case.

Q. Did Mr. Pentz tell Mr. Wise he would relate to him whatever happened with Mr. Young?

A. No, sir, he did not have any reference to it other than asking Mr. Wise to have lunch with he and the Hawthorn-Mellody people. That is the best of my recollection. There was nothing talked about this subject you are referring to.

(R. 469-470)

Q. Let me move to a meeting—I am sorry, let me move

to approximately June 13th, 1958, Mr. Flanagan. Do you recall a meeting held about that time?*

A. I am not real certain of specific dates, Mr. Hernacki. If you could recall a little more or give me a little more information—

Q. All right. Do you recall a meeting at which were present in the President Hotel in Mr. Wise's suite there, Mr. Pentz, Mr. Edquist, Mr. Augenstein, Mr. Callender, Mr. Wise, Mr. Gardner, Mr. Stewart and yourself?

A. Yes, sir, I do recall the meeting.

(R. 473-477)

THE COURT [sic]: Mr. Flanagan, what, if anything, was said about raising prices?

THE WITNESS: Nothing about raising prices.

Q. Well, will you try to think about it to see if anybody

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* The questioning related to an alleged two-step plan to first lower, then raise prices in Kansas City in the period June-October 1958, which was charged to constitute a conspiracy in violation of the Sherman Act under Count 12, and to involve sales at unreasonably low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act. Petitioner contended, and there was substantial evidence showing, that, owing to very low gallon jug prices, various areas in the Kansas City market in the spring of 1958 had low milk prices ("spot prices") generally, with the result that Sealtest retailer customers in different neighborhoods were paying widely varying prices, and home delivery business was rapidly disappearing; that when competing dairy companies (alleged co-conspirators) indicated they wanted to raise list prices, Sealtest executives declined to participate, revealing however that they were considering alternative courses—either introducing a new discount schedule at the current 33¢ list price, hoping thereby to eliminate price discrimination among Sealtest customers—or else recognizing the *de facto* average price of 27¢ by lowering list prices to that level (neither of which steps by Sealtest would have required acquiescence by or cooperation from competitors) (R. 834-40, 961-64, 6207-13, 6467-78); and that when Fairmont-Country Club Dairy thereafter lowered its price to 27¢, this was its independent decision, compelled by low store prices which were destroying Fairmont's home delivery business, and not done by reason of any conspiracy (R. 310-13, 720-22, 1658-60, 1722-25).

at that meeting said anything to the effect that they thought prices should go up or should be raised or the market should go up, anything to convey the idea that the prices should go up?

A. I don't recall any conversation of that kind, no, sir.

Q. Do you recall Mr. Pentz saying anything to the effect that prices should go up?

A. No, sir, I don't.

Q. Or Mr. Edquist subsequently after he said that, Mr. Edquist agreeing with him?

A. No, sir, I don't recall this.

Q. Did Mr. Wise say anything about he didn't think it should go up?

A. No, sir, I don't recall any conversation in regard to price of milk.

Q. Did Mr. Wise indicate in any language, any way the thought I am about to express, namely, that he didn't think the market was right or ready or ripe for an increase?

A. I don't recall this at all, no, sir.

Q. Did he say that to raise prices at that time would be the wrong thing to do?

A. No, sir, there was no reference to any—

MR. HERNACKI: Your Honor, may we approach the Bench?

THE COURT: You need not. I have followed this. You may refresh your witness' recollection.

Q. Mr. Flanagan, I am going to read to you again the testimony you gave in 1958 before the Federal Grand Jury in October of that year. I will ask you to listen to the questions and answers and again I will ask you something about it:

"QUESTION: You said something was said about raising the prices on the market. Who brought that question up?"

"ANSWER: Mr. Pentz brought it up, and Mr. Edquist brought it up."

"QUESTION: What did Mr. Pentz say about raising prices on the market?"

"ANSWER: Mr. Pentz was very anxious to raise the price of milk."

"QUESTION: And after he voiced that to you, what did Mr. Wise have to say about that?"

"ANSWER: Well, Mr. Edquist chimed in before that and said that certainly he thought that was the thing that should happen and Mr. Wise said, 'With the condition of the market today, I don't think it is right. Our company doesn't feel it is the time to raise it. We certainly are most anxious to get our house in order and to get things on a proper business basis, which it is not today, and to raise the price of milk certainly would be a wrong thing to do.'" Were you asked those questions and did you give those answers at that time, sir?

A. If you are reading from my grand jury wordage, apparently I did say this.

Q. Does that in this respect refresh your memory as to what was said on the subject of prices at this meeting?

A. Well, it is as new to me right now since you are reading it—I am not able to recall any more.

THE COURT: When you say, Mr. Flanagan, you are not able to recall any more, does this refresh your recollection that Mr. Pentz did bring this up and that Mr. Edquist brought it up and there was some discussion of this and Mr. Wise had indicated that he did not think now was the time to do it?

THE WITNESS: I don't recall it.

THE COURT: And this testimony does not refresh your recollection at all?

THE WITNESS: No, sir, it doesn't. I don't recall it being discussed.

(R. 494-495)

Q. Did Mr. Wise at the meeting in June, 1958, at the President Hotel, which we have been discussing, say that he

thought that spot pricing should be removed?

A. I don't recall any specifics in regard to conditions of the market other than saying that they were simply deplorable and that the gallon jug thing, quite badly. Now, this is my main recollection of the meeting and the topic of conversation.

Q. Did he say that he thought the two-for-ones were wrong?

A. I don't recall him saying it. I know he felt that they were wrong, I know we felt—

Q. Again, Mr. Flanagan, we are only interested now in what he said at the meeting as best you recollect.

A. I don't recall him saying this.

Q. Did he discuss the 13 per cent discount or the long discount to Milgram?

A. I don't recall whether he discussed percentages or whether the subject was talked about or not. I am not able to recall.

Q. Was anything said about the discount being granted to Milgram?

A. Oh, there was some reference to the pricing of milk out-of-store by Mr. Edquist, if I recall properly, and he was concerned about what this product could cost the dealers so they could use it for a cost leader out-of-store market prices.

Q. Is this in relationship to particular account?

A. They had—in relation to the Fleming Company and the Milgram Company, if I am not mistaken.

Q. And again what did he say about that?

A. Wondering if there was a discount that would allow a different price. I don't recall the specifics of it now.

(R. 497-507)

Q. Didn't Mr. Pentz say at this meeting that because Sealtest and Borden's, and again in any language, because Sealtest and Borden both were selling Milgram's, that they could get that price up if they desired?

A. I don't recall that being said that way.

Q. In other words, they could eliminate discounts between them?

A. I don't recall that, I sure don't.

Q. Isn't that when Mr. Edquist made the remark that he thought that should be done so that there should not be any accounts having a special price other than the published schedule?

A. I don't recall this specifically.

Q. Well, now, we have talked about it. What is your best recollection now?

A. Well, as I say, with the—in their case, TV Fleming oftentimes being sold out-of-store less than prevailing market prices, he was concerned, Mr. Edquist, if I recall, as to what was the discount schedule with them so they could do these things. Of course, there was nothing with them, and this is the thing that was misunderstood so many times, that Fleming paid the same price for TV milk as they did Sealtest which was our going schedule.

Q. Isn't it possible that you weren't going to tell Mr. Edquist for certain whether or not Fleming was getting a special discount?

A. Restate that, sir.

Q. I am suggesting that you would not want Mr. Edquist to know definitely the basis on which you were selling Fleming TV milk?

A. Well, it would be no one's business but ourselves, how we conducted ourselves.

Q. So at that meeting, would it not be the case that Mr. Wise would not tell the other that Fleming TV was not getting any better discount than anybody else?

A. I don't know whether—I didn't hear it so I don't know.

Q. Didn't Mr. Wise say that the off-program pricing, or the long discount or the Milgram discount, whatever you wish to call it, should be eliminated from the market "so

we would be able to say we have a sound market on a good sound basis?".

A. I don't recall this, sir, the particular wordage of this kind, I don't recall.

Q. Now, in any other language, did he convey that thought?

A. I don't recall it, I certainly don't.

MR. HERNACKI: Your Honor, at this time—

THE COURT: Do you have in mind—

MR. HERNACKI: I have in mind—

THE COURT: What page?

MR. HERNACKI: 1643 and 1644.

THE COURT: You may proceed.

Q. At this time, Mr. Flanagan, I would like to again read from the October, [1958] grand jury transcript,—

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"QUESTION: Did Mr. Wise say he thought the spot pricing should be removed?

"ANSWER: He thought that spot pricing was wrong, yes."

"QUESTION: He thought it should be removed before you raised your prices?

"ANSWER: He thought the subsidy to grocers should be discontinued. He thought that the two-for-ones were wrong. He thought the competitive situation we found ourselves in, with the Milgram Company served by the Borden Company, as well as our own, on a 13 per cent discount should not be handled on the basis it was handled, it should be a published discount—

"QUESTION: (Interrupting.) Do you mean one special account, Milgram's, had been given this large 13 per cent discount?

"ANSWER: Yes, sir.

"QUESTION: And you say—don't they use the term "long discount," you say that should be eliminated in this market? Is that the term used to describe a 13 per cent or large discount like that?

"ANSWER: I haven't heard that. It's just an off-program pricing. I'll put it that way.

"QUESTION: Do you feel that was discrimination, that large discount to that one account?

"ANSWER: Well, it was a competitive move on our part.

"QUESTION: To meet it?

"ANSWER: To have to meet the situation. We were—

"QUESTION: (Interrupting.) Did he say that was one of the things that would have to be eliminated before he felt he could raise his prices in this market?

"ANSWER: He felt that certainly should be eliminated from the market so we would be able to say we have a sound market on a good sound basis.

"QUESTION: So he outlined about three or four things he thought should be accomplished on this market before there was any price raise?

"ANSWER: He outlined the things as a desire of our company to put into practice before we would be interested in raising the price of milk."

Now, were you asked those questions, Mr. Flanagan, and did you give those answers at that time?

A. That is apparently what you have read here, as being part of my grand jury conversation, apparently that is the way it was said.

THE COURT: Just a moment. Did you have something else?

THE WITNESS: Yes, I am saying Mr. Wise, in here as you read, that Mr. Wise always has expressed himself, has always, that any customer treated differently than another on a fair and equitable basis was wrong. This has been his philosophy I have heard for many years, and he felt that spot pricing, he felt that discounts to someone other than another account of like size or stores of similar size was as wrong as it could be, and he did not like it, and I don't recall him discussing this in this meeting but if he did, I am not surprised.

Q. Well, what does this material refresh you on now that you have heard us go through it? What does it remind you, what does it ring a bell, however dim in your mind?

A. Other than just what I have refreshed myself, this is what I recall.

Q. You have told us what the philosophy of Mr. Wise was. Did he discuss this philosophy at the meeting?

A. That is what I say I don't recall. Having known Mr. Wise as long as I have and knowing how he operates, how he works, how he feels, this is Mr. Stewart's feeling too, as well as my own, that I don't recall him expressing this, during this meeting that you are speaking of, but—

THE COURT: Mr. Flanagan, let me explain the purpose of why counsel read you these questions and answers. The purpose of that is to see whether or not, in hearing what you had testified to in 1958, aids you at the present time in recalling what was said at these meetings.

THE WITNESS: Yes, sir, I understand that.

THE COURT: Now, do the questions and answers that counsel has read to you help you refresh your recollection as to what was really said there? That is what we are trying to get at.

THE WITNESS: I appreciate it, sir, and I am trying to recall. I don't remember these being about in the presence of competition. I don't recall this.

As I say, it wouldn't be any trouble for me at all to recall what his philosophy of operating a business, but whether or not he discussed this, I am not certain, and this is the part that I certainly want to make myself clear on. I understand the purpose but I am not able to say.

THE COURT: I wanted to be sure you did understand the purpose.

THE WITNESS: Yes, sir.

THE COURT: And to listen to your prior testimony in order that you can take that into consideration as you presently search your recollection here today.

THE WITNESS: Yes, sir. As I say, it has been—1958, this is four years and we have had very chaotic market since all this time, and to remember specifics is just really beyond my capability.

THE COURT: I understand.

THE WITNESS: But I will do my very best, sir.

Q. At the time you testified, Mr. Flanagan, as you now sit there, do you recall that that testimony you gave was your very best recollection?

A. Yes, on the spur of the moment, without having a lot of time to consider or think about it, as I recall, I was asked questions before a group of people who were the jury, and I think some two or three attorneys, Mr. Mann, Mr. Eisen posed these questions, and I gave answers the best I knew how at that time.

Q. Now, is there anything in which I have just completed reading which you now believe was wrong or different or in any way a change from what I have read, in other words, you now remember something that was different from what I have just read to you?

A. No, I am not able to connect the two together. My memory just doesn't serve me this well. I am sorry.

Q. Does this refresh you in any respect, that not only was Mr. Wise opposed to the giving of that discount which was being given to Milgram, but Mr. Pentz made what you might say an offer that "we can both eliminate it because it is only business between us," and Mr. Edquist said "that is, in effect, a good idea to do that. It should be done?"

A. I don't recall this, that there was anything of this kind. I know that Mr. Edquist was quite concerned as to how these stores could be pricing differently. He certainly, himself, felt that if there was anything different than a standard published program that was contributing to chaotic conditions of the market, that they were not correct or not right. Knowing as—I am repeating myself—but knowing Mr. Wise's philosophy of market management, that if this be the case that he certainly would agree.

Now, whether he agreed with these folks present or whether I am recalling just the philosophy that I have grown up and learned and have known in this business for a number of years, I am not able to say.

MR. HERNACKI: Your Honor, at this time I would like to read from Page 1647 of the transcript.

THE COURT: You have permission to do so.

Q. Again, Mr. Flanagan, we will follow the same procedure:

"QUESTION: What did they say after Mr. Wise stopped or finished reciting these various factors on the market which he felt were unsound?

"ANSWER: Going back, in reference to the price of milk to Milgram's, Mr. Pentz made the statement that that particular account 'which is served by both our companies, can be handled between ourselves, Sealtest and us; and the price could go on up', which again indicated, and I say 'indicated', I was sitting there and had to draw my conclusions, that this was not a program, that it, again, was just a deplorable situation, as far as our company was concerned.

"QUESTION: At least, Mr. Pentz was willing to eliminate whatever Mr. Wise objected to in Bordens' relationship with Milgram's, is that correct?"

MR. CHADWELL: Pardon me, Your Honor, it is hard for me to keep up. This last I didn't get, would you mind if he reread that?

"QUESTION: At least, Mr. Pentz was willing to eliminate whatever Mr. Wise objected to in Bordens' relationship with Milgram's, is that correct?

"ANSWER: That's what his statement would lead you to believe. Mr. Edquist, then, upon Mr. Pentz's statement, said, 'I agree with you, the whole market should be on the same basis'."

Were you asked those questions, sir, and did you give those answers before the Grand Jury?

A. I am sure that would be true, if they are in there.

Q. How about that, does that help you some on the question, let's say, of what Mr. Pentz said about the Milgram discount?

A. I am not sure that that was said. I am not sure that there was any reference made to any particular discount or size of discount or to any particular people. Now, I am just not sure that there was. I don't recall that there was.

THE COURT: Does the reading of these questions and answers have any effect upon your present recollection at all?

THE WITNESS: Actually, they don't have. It has been too long ago for me to be able to say this is the case.

(R. 513-523)

Q. Now, Mr. Flanagan, I am going to leave that meeting, and I want to ask you if you were present at a discussion with Mr. Stewart, Mr. Banfield, Mr. Wise, Mr. Gardner, about this same period of time?

A. There have been several discussions, which one are you—

Q. All right. At this one, was Mr. Banfield—do you remember one where Mr. Banfield was instructed to prepare some price studies or price lists or work sheets containing prices, whatever you wanted to call them, was he asked to prepare such a thing?

A. Well, I don't recall him being asked to prepare. I know that we constantly—I will answer you this way: I know that we constantly take a look at our position with regards to our finance at the prevailing price of milk in the market, including any chaotic conditions or discounts ever prevailing. Now, these are in normal type of business study that we have had for any number of years and still do today.

Q. And does Mr. Wise always come into town to direct Mr. Banfield in the preparation of such documents?

A. No, sir, anything of that kind is either a part of his normal duty or, I would say, at the request of Mr. Stewart.

Q. Now, were you present—do you recall such a meeting with those people present about that same period of time when Mr. Banfield was directed to make a study on the price of milk which was not a price then in effect?

A. No, I don't remember that specifically, no, sir.

• • •

Q. Were you present, Mr. Flanagan, at a gathering when Mr. Wise was there, Mr. Gardner, Mr. Stewart, yourself and Mr. Banfield, and Mr. Banfield was suggested or told or directed to prepare a price list which would lower the market from the price prevailing at the time to meet some very low prices then being charged, namely in that period of June, 1958?

A. No, sir, I was not.

Q. Were you ever present in the room when Mr. Wise was there and Banfield was told to make up a projected price list of some sort of any kind?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. Or you deny it, which is it?

A. I don't remember of ever being present when Mr. Banfield was asked to make any price lists.

Q. All right. Suppose we call it a price study.

A. Or a price study.

Q. Or a work sheet or work study.

A. No, sir.

Q. Would your answer be any different?

A. No, sir, it wouldn't.

• • •

Q. All right. Were you ever present when Mr. Banfield was asked to prepare a work sheet to show prices which would be almost equivalent to the low prices then in existence in June of 1958?

A. Not as specific direction, no, sir, I have not been present when this was done. This is a thing that we would

normally do, anyway. I think Mr. Banfield very possibly would furnish Mr. Stewart with the—with a study of our business as to how it was being done with regards to the percent at certain figures, if the market is chaotic, or if we are met with better conditions, this would be a normal thing for the office, to furnish Mr. Stewart with our results based on the condition of our business.

Q. Were you ever present at such a gathering of those people that I have named when Mr. Banfield was given certain prices, certain figures, being figures for a half gallon of milk in a paper carton, and told to prepare a work sheet of all the other products in relation to that?

A. No, sir, I was not. I was never in it at a time like that.

Q. Were you ever present in the room when Mr. Wise was there and Mr. Banfield was given any directions on preparing any kind of a work sheet or work study?

A. No, sir, I was not present.

Q. Would it refresh your recollection any if I suggested there were—that he was asked to prepare two price work sheets?

A. I don't recall—

• • •

THE COURT: Why don't you rephrase the question.

Q. Very well. Mr. Flanagan, let me suggest that at such a gathering, Mr. Banfield was asked to prepare two listings of prices and products instead of just one, whether in a work sheet form or any other manner? Do you recall anything like that?

A. No, sir, I do not.

MR. HERNACKI: At this time, Your Honor, I would like to read from Page 1621 of the Grand Jury transcript.

THE COURT: You may do so, continuing over to Page 1622.

Q. We will follow the same procedure, Mr. Flanagan. Again, this is from your 1958 testimony, in October of that year.

"QUESTION: Were you present at the time Mr. Stewart asked Mr. Banfield to work up that price list?

"ANSWER: I was in the room when Banfield and Stewart and Mr. Wise and Mr. Gardner and myself—that was suggested to Banfield that he make it up, yes.

"QUESTION: That would be a price list which would lower the market from the price that was prevailing at that time; it would devise a new price list which would meet the lowest price being charged on the market at that time?

"ANSWER: It would come close to it. It wouldn't be the lowest, but it would reduce the price of milk, yes, it would.

"QUESTION: Did you also ask Mr. Banfield to work up another price list which would elevate the half-gallon up to 33¢ per half-gallon.

"ANSWER: I think that was talked about. Now, the specific price, I'm not certain about that.

"QUESTION: Wasn't Mr. Banfield called in by the gentlemen you have just named, and he was asked to devise a lower price list and also a price list?

"ANSWER: There was two price lists; actually two different studies made."

Were you asked those questions and did you give those answers?

A. Again, sir, I can't recall this interrogation, these questions and these answers. I know you are reading from what I had to say, but for the life of me, I am not able to recall specifically as you read them.

Q. Would you recognize any of your language that is attributed to you in this transcript as being the kind of language you would normally employ?

A. I am sorry, sir, I am not able to help you on that. I don't recall it.

Q. Well, did Mr. Banfield come up with two price work sheets about this period in June of 1958?

A. Again, sir, I don't recall if he did or not.

Q. Well, didn't you ever see one of them, or didn't you see both of them?

A. I have seen many, many studies.

Q. By Mr. Banfield in June of 1958 about this period of time?

A. I have seen many studies. I don't recall when or just what particular studies you are speaking of. I have seen many, many studies on the prices of milk in this market.

Q. Now, Mr. Flanagan, weren't you asked to prepare a discount schedule which would be used in correlation with these same price study work sheets, whatever you wish to call them?

A. You say was I asked? I don't recall being asked to do this.

Q. All right, did you? Did you prepare a discount—

A. I don't recall. Sir?

Q. I say, did you prepare or assist anybody else in preparing a new discount schedule in June of 1958?

A. I would say that any price schedule or a discount schedule that we would have in mind of putting in a market that I would be talked with, I would talk about it, I would help Mr. Banfield in putting some of these figures together, and they in turn would be furnished to Mr. Stewart, so it is not at all unusual for this to be.

Q. Now, I am not interested in what is unusual or not. I want to know what you did at that time.

A. Well, I am not able to recall specifically at this time being any specific discount or any studies that we made. I don't recall them specifically, since we make so very, very many of them.

Q. Weren't two work sheets made up, one of low prices, one of higher prices, and didn't you work with Mr. Gardner to prepare a discount schedule which was contemplated being in effect the same time these prices would be in effect?

A. I don't recall it specifically.

Q. Well, in any general way, do you recall it?

A. No, sir, I don't. As I say, we have done this so many, many—possibly hundreds of time, I don't recall.

MR. CHADWELL: If Your Honor please, I think it is obvious that if Mr. Hernacki wants to inquire as to any particular price sheets, the witness would be aided in seeing them. He is evidently having trouble recalling as to generalities on the subject.

MR. JINKINSON: I agree with counsel, he is having great difficulty in recalling anything, not only generalities but specifics.

MR. CHADWELL: I think it would be helpful if he saw what you are talking about.

MR. JINKINSON: I think we have directed the witness' testimony, Your Honor.

THE COURT: The objection will be overruled, although I think counsel has a distinct point that definitive response to questions relating to price lists in this period of time are quite unlikely to be produced in this witness.

(R. 527 - 538)

Q. Mr. Flanagan, did you at any time in the period of June, 1958, work together with Mr. Gardner in the preparation of a discount or a work sheet of any sort?

A. I may have. It is very possible that I could have. I don't recall specifically.

Q. Specifically, a 7 per cent discount?

A. There was a 7 per cent discount.

Q. Did you and Mr. Gardner together prepare a schedule of a sort?

A. It might have been Mr. Gardner, Mr. Banfield, myself, those that would be in this type of work in our company, very likely could have been.

Q. Do you recall with what kind of a set of prices this discount schedule of 7 per cent would be used with?

A. Not specifically, no, I don't. What figure this—the

discount system would apply to, I don't recall specifically, whether it was a 39 per cent price or 37 or 35. I am not sure.

Q. Was the discount schedule we are discussing prepared in connection with possible use with one of two different price lists then also being prepared, proposed price lists?

A. I don't recall this specifically. Whether—you say two price lists?

Q. Yes. I had examined you this morning concerning whether or not Mr. Banfield was instructed to come up with two price studies or work sheets—

A. Yes, sir.

Q. —two different group of prices of milk products, and I am asking you now whether the discount study, 7 per cent discount study, which you have worked, was used or to be used or was contemplated in connection with those two price studies which Mr. Banfield—

A. I don't recall any two price studies. It wouldn't have been any two particular price studies. It could be any number of wholesale lists. It could have been any number of them.

Q. In connection with the preparation of this discount schedule, what kind of work would be involved on your part or on the part of people who worked under you in Sealtest to prepare it?

A. Well, there would be a tabulation of our customers in category as to their size and how they themselves, in respect to volume, could avail themselves of this discount so that in turn they could be selling their milk at a then competitive price. We take into consideration volume, and the size of our customers, called savings.

There are just many facets to determining what bracket, what percentages and so forth would fit into this type of picture. It is very complex.

Q. Would it be a sort of a trial and error thing in com-

puting a bracket and then seeing how many accounts would fall into that bracket and that —

A. It may be a certain amount of trial or fixing a figure after we arrive at it and it also has to do with figuring what the savings would be to us and the type of customer that would have a considerable amount of business versus one that would have a very small amount.

Q. About how much time would that sort of thing require?

A. Well, it could be quite some length to make a very thorough study.

Q. More than a day?

A. In some instances it could be more than a day.

Q. Could it be as much as three or four days required?

A. In some instances if the material was not available, if our particular studies were not current enough to reflect our business as it was at that particular time, if it wasn't current studies, it could take some time to make this study. It is office detail of compiling figures and so forth, and quantities.

Q. Now, the discount schedule which had been in effect in June of 1958, had been in effect for a number of years prior thereto, had it not?

A. Quite some time.

Q. So this would have been the first discount schedule you were helping prepare in many a day, up to that point?

A. Well, we have made studies continually and analysis of our price structure, size of routes, grouping of customers to size, grouping of customers on their needs in regard to how many half gallons or total points they would buy and the proper distribution of these accounts on proper route structure to keep our drivers' time in line with one another, so one wouldn't have a heavier route, heavier day versus one that have a lighter day, on proper distribution with a minimum number of trucks and men to properly service this general area.

Q. Yes, sir, but you were not making a study directed to the preparation of an entirely new discount schedule

which was going to be contemplated being put into effect in the entire market?

A. No, however, if these figures were available and current, these figures would have been a result of quite — quite a bit of study would be available to us and would be used.

The wholesale business, it would have been appraised regularly to see where it stood in volume and distribution.

Q. Now, I am going to ask you, and what we covered in the morning may help, do you now recall anything about a grouping where Mr. Wise, Mr. Stewart, Mr. Gardner, you, and Mr. Banfield were present, Mr. Banfield being asked to prepare a proposed price study, one price a low price directed to some of the lower prices then in existence in the market and the other price—I am speaking of the half gallon price, being directed to a price then the current list price on the market?

A. I don't recall specifically of any direction of putting this together, but I would say this would be a common practice for us to have this knowledge or to have this type of study for this to be a part of our work day, and Mr. Banfield's duty to have this type of knowledge or information through his study that would be readily available to him at his fingertips with very little amount of work, it wouldn't take long to put this together.

Q. Was Mr. Banfield asked to prepare such a study after this June 13th meeting in the President Hotel?

A. Not in my presence.

MR. HERNACKI: At this point, Your Honor, I should like to read from Page 1628 to 1630 of the grand jury notes.

THE COURT: Yes, would counsel approach the Bench, please?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: I want to advise counsel for the defense that during the noon hour, counsel for the Government

handed me a note designating Pages 1628 to 1630 in the same pattern as those directed this morning. I want to assure counsel that I have studied the grand jury transcript that appears on those pages, and will permit Government counsel to attempt to refresh this witness' recollection by the reading of those pages.

I wanted to be sure that counsel understood that I had studied those and that was the purpose of coming here.

MR. CHADWELL: I appreciate your comment, Your Honor. This is in addition to what the Government had shown you before Court opened this morning?

THE COURT: That is correct.

MR. CHADWELL: I want to renew our motion, Your Honor, and discuss it with the Court, but perhaps it would be better to wait until counsel is finished with this witness, because for all I know, they have some other sections of the transcript to read to him and I have got something I wish to say to the Court with respect to all of them.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Very well.

Q. Again, Mr. Flanagan, we will follow the same procedure. I will read the material then ask you about it.

A. All right.

Q. (Reading): "QUESTION: How long did it take Mr. Banfield to work up this price list that he had been requested to work up?

"ANSWER: I don't recall. It takes—we have made some studies before and it generally takes us sometimes a week. In other words, we make a complete study of our volume accounts.

"QUESTION: We are talking about a specific price list, two price lists?

"ANSWER: Yes.

"QUESTION: Mr. Banfield had been directed by Mr. Wise, was it, to prepare these two price lists?

"ANSWER: Mr. Wise or Mr. Stewart. Between the two, I would say certainly.

"QUESTION: You were present at the time Mr. Banfield was given those instructions?

"ANSWER: Yes, I remember him being asked to work up a study."

* * *

Q. (Reading): "QUESTION: When did you see these studies that he worked up, how long after this meeting at which he was told to do this?

"ANSWER: Well, I would say it could very well have been three days after or four days after. I mean sometime after, and the reason I say that, there was a very, very complete study made of all the accounts that we served of which there were—there are over 900 accounts and we made a complete study of all the accounts, as to their volume they did with us the previous month, so we could know about where we had to fall in our volume discount scale.

"QUESTION: Had Mr. Banfield been instructed to make up price lists and had you and Mr. Gardner been instructed to make up discount schedules?

"ANSWER: No, we all worked on the same thing, I mean we all contributed to it. I am sure Mr. Gardner and myself worked on a proposed volume discount, and I was asked several questions by Mr. Banfield and his office people about various accounts, where they could find the tickets, and what routes they were on and so forth, so we could pinpoint them, and this all took quite a bit of time to transpire. I don't recall how much time, but it is quite a bit of work.

"QUESTION: Three or four days, would that be correct?

"ANSWER: Easily that, to compile that much information.

"QUESTION: Were you given copies of the two price lists after Mr. Banfield had finished his study?

"ANSWER: Yes, there was a carbon copy of it—

"QUESTION: (Interrupting.) Mr. Stewart got a copy and you got a copy and Mr. Wise, I suppose, do you know if he was sent a copy to Chicago?

"ANSWER: I don't know if he was or not.

"QUESTION: Do you remember what the half gallon price was on the lower of the two price lists?

"ANSWER: I would have to make a guess at it. I think it was a 27 cents wholesale list, if I am not mistaken.

"QUESTION: And the higher of the two price lists, what was the wholesale price on half gallons?

"ANSWER: There again it would be a guess, but as I remember, 33 cents."

Mr. Flanagan, were you asked those questions and did you make those answers?

A. Apparently so.

Q. Does that in any way, any portion of it, bring any of this back to you and refresh your memory as to any of these events?

A. Only that I can say again, it is quite typical for us to make studies, either use material that is available to us, or if necessary, make new studies, thorough, to determine these discount brackets.

(R.610-612)

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: Mr. Chadwell, at the informal conference last night, we both recalled that you had reserved the right to make a motion for the record in regard to the grand jury transcript, and before we all forget it, I wanted to give you that opportunity this morning to make a motion for the record.

MR. CHADWELL: Thank you, Your Honor. I would like to move, and do move, for the right to inspect the grand jury transcript of the testimony of Mr. Flanagan, who testified yesterday with respect to all matters that were inquired into by Government counsel in the questions designed to

attempt to refresh his recollection, not only the questions and answers which were read to him but all other portions of the testimony relating to the subject matter thereof.

I want to make it clear I am not asking to go beyond the subject matter of the questions and answers which were actually read to the witness, but I felt that I was unable properly to evaluate his testimony in the absence of the complete transcript on those points.

THE COURT: Let the record show that the defense motion will be denied.

The record should also show that the Court read all of the testimony given in regard to a particular subject in regard to all of the questions and answers used for the purpose of refreshing Witness Flanagan's recollection, and that I also checked word for word the Government's reading of the particular questions and answers during the course of Mr. Flanagan's examination. The reading was accurate, word for word.

On another matter the Government has submitted a similar list in regard to possible refreshment of the recollection of the witness Vincent Crimmins about 9:30 this morning, and between 9:30 and now, I have read all of that testimony, both marked in black and in red, as the procedure was outlined earlier in the record, so that it will not be necessary, when and if it becomes necessary to reflect and I take time to read it, but I want to assure counsel that I have read it and will again follow word by word any questions and answers that it might be necessary to read in connection with the refreshment of the witness, Vincent Crimmins.

MR. CHADWELL: May I make a statement to Your honor?

THE COURT: Yes.

MR. CHADWELL: I have no doubt that Your Honor has done just that, and I appreciate that, but nevertheless we urge the motion with respect to the grand jury transcript read to Mr. Flanagan and I now wish to move for the right to inspect the transcript of the witness, Mr. Crimmins, about which Your Honor has just spoken, and I

would like to inspect not only what the Government will read to him but also other portions of the transcript dealing with the same subject matter, and the reason is not that I in any way doubt that the Court has inspected it and will watch to see that the questions are accurately read but in order that I may—or counsel for the Defendants may properly evaluate the transcript and the portions read to the witness, and be better able to cross examine the witness on the testimony.

THE COURT: The Court will make the same ruling in connection with that motion.

VINCENT CRIMMINS
Fairmont-Country Club Former Sales Manager

(R. 636-644)

Q. I would like to show you a document, Mr. Crimmins, in evidence in this case as Government's Exhibit 181-A* and ask you to give us your best memory on when you first saw that document?

A. Well, sir, I—at the time I surrendered this document to the Government, I made a real effort to recall where I got it and I—at that time, I felt that I likely received it from Mr. J. M. O'Bryan out at Christ the King Church at 85th and Wornall. I can't remember the circumstances with certainty, but that was my best idea at that time.

Q. It that your best memory?

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* GX 181-A was a document of unknown origin which Sealtest's accountant testified was "not our list" (R. 1392-96). The document was received in evidence during testimony by Glen Phillips, former Hawthorn-Mellody manager, who testified it was a list or "similar" to a list exhibit by Peterson of Fairmont at a meeting not attended by anyone from Sealtest (R. 352-54). Government counsel claimed that GX 181-A reflected an alleged plan by Sealtest first to lower, then to raise prices, as charged in Count 12. GX 181-A is reproduced on the following page.

GX 181A

		WHOLESALE			RETAIL		
		Present	# 1	# 2	Present	# 1	# 2
Homo	Qt.	17	14	18	21	17½	21½
Homo	½ Pnt.	6					
Homo	½ Gal.	33	25	33	40	32	40
Homo. Gal	Bulk	74	50	66			
Homo. Gal	Disp.	79	55	71			
Regular	Qt.	17	14	18	21	17½	21½
Regular	½ Gal.	33	25	33	40	32	40
Regular Bulk	Gal.	74	50	66			
Light Cream	½ Pnt.	20¾	15	19	26	23	?
Light Cream	Qt.	78	56	72			
Light Cream	Gal.	31½					
Heavy Cream	½ Pnt.	31¾	25	31	39	35	36
Heavy Cream	Qt.	1.32					
Half & Half	Pnt.	26¼	25	25	31	29	30
Half & Half	Qt.	51½	49	49			
Sour Cream	8 Oz.	26	20	25	29	25	30
Choc. Milk	½ Pnt.	6½	6	6½			
Choc. Milk	Qt.	21¼	14	20	25	19	24
Skim	Qt.	17¼	12	16	22	15	20
Skim	Gal.	56	48	64			
Orange Drink	½ Pnt.	5	6	6			
Orange Drink	Qts.	16½	18	18	21	23	23
Buttermilk	½ Pnt.	5½	5	5½			
Buttermilk	Qt.	18½	12	16	24	16	20
Buttermilk	Gal.	78					
Cr. Cott. Cheese	Lb.	19	19	19			
Cr. Cott. Cheese	2 Lb.	36½	36	36	43	43	
Cr. Cott. Cheese	12 Oz.	17¼	17	17	22	22	22
Dry Cottage Cheese	Lb.	16	13	18			
Dry Cottage Cheese	12	16¼					
2%	½ Gal.	29	22			29	

500 To 1500	2%
1500 To 2000	3%
2000 To 2500	4%
2500 To 3000	5%
3000 To 3500	6%
3500 Up	7%

Central Billing & Advertising Allowance 3% 2 or more stores qualify

July 58 [handwritten note]

A. Well, as I say, I can't remember it with certainty, but I know I got some papers from him there and I thought that probably was it.

Q. Now, at the time you received this document, did you have occasion to have a conversation with Mr. O'Bryan?

A. I don't recall any conversation about it. There were conversations later, it was in our office, and there were discussions in the industry later about it, but I don't remember any specific conversation at that moment.

Q. Did you have a conversation with Mr. O'Bryan about the proposals shown on Exhibit — well, strike that, I will withdraw that question. Did you have a conversation with O'Bryan with reference to the figures shown on Government Exhibit 181-A?

A. Well, as I say, it was discussed in the industry and I discussed with Mr. Peterson and with others, and I can't remember at the present moment a specific discussion on that subject.

Q. Did you have such a conversation with Mr. O'Bryan?

A. I just can't remember that particular conversation.

Q. Did you appear before the Federal Grand Jury —

A. I did.

Q. — when they were investigating that matter?

A. Yes, sir, I did.

Q. On July 1, 1959?

A. I don't remember the exact date, but I remember appearing.

Q. At that time you appeared, you were asked certain questions and you made certain answers?

A. That's right.

Q. Now, in an effort to —

MR. EISEN: If the Court please, I would like to, at this point, attempt to refresh the witness' recollection of his prior testimony before the Grand Jury.

THE COURT: What pages do you have in mind?

MR. EISEN: Page 2310.

THE COURT: Yes, you may do so.

Q. Do you recall at that time that you were asked certain questions and made certain answers?

A. I do.

Q. I would like to read from Page 2310 of the transcript of your testimony, Mr. Crimmins.

"QUESTION: Do you have any recollection as to the conversation that you had with the person who gave it to you at the time you received it?

"ANSWER: Well, I believe, now, to my best recollection, that it came from a representative of Foremost Dairies saying that, 'This is a proposal for market changes by Mr. Ray Wise,' an official of the Sealtest Company, as you understand. I didn't see Mr. Wise, but it was handed to me as one of his proposals.

"QUESTION: Was it Mr. Callender who gave this to you?

"ANSWER: I don't believe it was Bill Callender, I believe it was J. M. O'Bryan." Does that refresh your recollection, Mr. Crimmins?

A. Yes, I would agree with that, that was my opinion at that time, and no doubt my memory was more vivid then than now. I would not dispute that.

THE COURT: Mr. Crimmins, the purpose of counsel reading those questions is to actually refresh your recollection and the Court wants to be certain that having had this material read to you, whether your recollection is really refreshed and that you recall that that is true?

THE WITNESS: Your Honor, I can't recall the circumstances of his handing it to me. At the time — or any circumstances of him handing it to me. At the time that I was asked about this document, where it was obtained or where I could have received it, I did my best at that time to try to reconstruct in my mind where I might have received a thing like that and I am doing so now, but I can't remember any words or the position of where we — just at the moment, what transpired at all.

THE COURT: Did the questions counsel asked you and the answers he read correspond with your present recollection of what you have been able to reconstruct as best you can?

THE WITNESS: Well, Your Honor, I made a sincere effort to reconstruct the matter pertaining to this document and I am certain it was in our office, it was in my file. I am not absolutely certain where it came from, where I received it. At the time I testified before the Grand Jury, I tried my best at that time to go over the events which transpired and try to figure out the best — in my opinion, the best place or the place where I thought it came from.

THE COURT: What I am really getting at, are you willing today, from your present recollection, to adopt what you said before the Grand Jury as the best effort that you could make?

THE WITNESS: At that time, yes.

THE COURT: Yes, all right.

Q. Now, does this testimony also, Mr. Crimmins, refresh you as to whether or not you had a conversation with Mr. O'Bryan with reference to the proposal at that time, the time you received the document?

A. At that time, I can't recall any conversation with him at that time, but that document, at this moment I can't.

MR. EISEN: If the Court please, I would like to just continue on to the next question in the course of his transcript to see if its refreshes his recollection.

THE COURT: You may, at the bottom of Page 2310 down approximately half-way to 2311.

Q. (Reading:) "QUESTION: Was it Mr. Callender who gave this to you?

"ANSWER: I don't believe it was Bill Callender, I believe it was J. M. O'Bryan.

"QUESTION: When Mr. O'Bryan gave it to you, did he state that the two price lists appearing on this sheet of paper, one was to go into effect first, the one marked "Column 1" there—

And that is apparent, from the record, that the Examiner pointed to, indicated "1."

A. Yes.

Q. (Reading:) "ANSWER: (Interrupting.) That is right.

"QUESTION: (Continuing.)"—

MR. McLAREN: Excuse me, Your Honor, may we have that back, up to the point of the "Interrupting?"

MR. JINKINSON: You want to have him read it back?

MR. McLAREN: I want the reporter to read it. (The record was read by the reporter as follows: "Question: When Mr. O'Bryan gave it to you, did he state that the two price lists appearing on this sheet of paper, one was to go into effect first, the one marked "Column 1" there—And that is apparent, from the record, that the Examiner pointed to, indicated "1.")"

THE COURT: Mr. McLaren, do you understand—

MR. McLAREN: I couldn't tell what counsel was interpolating in there, if anything, about the pointing.

MR. JINKINSON: Let the record show that he was pointing at "Column 1" on the Exhibit 181.

MR. McLAREN: Is that in that record?

THE COURT: Yes, this is in this record, and what counsel is attempting to do is to aid the witness in attempting to refresh his recollection by doing the same thing that happened, and it is obvious from the transcript that at the time you were examined before the grand jury he showed you this record and pointed to "Column 1," and Mr. Eisen is doing the same thing in order to reproduce the best he can the same situation.

I was about to suggest he hand you No. 1 because I am sure you had that in your hand when you were testifying before the grand jury.

THE WITNESS: That is true.

THE COURT: Let me pick up so the jury will catch the full sequence.

Mr. Eisen had read these questions — or rather this question: "QUESTION: When Mr. O'Bryan gave it to

you, did he state that the two price lists appearing on this sheet of paper, one was to go into effect first, the one marked, quote, Column 1, end quote, there."

"ANSWER: (Interrupting.) That is right.

"QUESTION: (Continuing.) — and that later on the prices shown in the second column were to go into effect?"

You may continue, Mr. Eisen, from that point.

Q. (Reading:) "ANSWER: That was my understanding, yes, sir.

"QUESTION: And that this proposal made by Mr. Wise as a means of stabilizing or straightening out the price structure in Kansas City?".

I would like to correct the record on that. I misread that.

"QUESTION: And this was a proposal made by Mr. Wise as a means of stabilizing or straightening out the price structure in Kansas City?

"ANSWER: That is right. I have no doubt of the source of information. I can't recall with certainty that it was handed me by O'Bryan, but I think it was, and I know I had no doubt about this was a reliable source of information."

Now, Mr. Crimmins, does the reading of your prior testimony now aid you in recalling that you did have a conversation with Mr. O'Bryan about the proposal shown on Government Exhibit 181-A?

A. Well, sir, it is my opinion now that when I pointed to this list before the grand jury that I was saying, this was the plan, not necessarily that I had a conversation with Mr. O'Bryan but this was a market plan or proposal for straightening out the market, and I cannot at this moment recall discussing this matter with Mr. O'Bryan, but I remember that I — as I stated there that I had this in my possession and that I felt that it was a proposal to follow this pricing in the market.

EDWARD H. GILMORE
Hawthorn-Mellody Dairy Former Sales Manager

(R. 785-799)

Q. Now, Mr. Gilmore, directing your attention to the summer of 1958, did you, in the course of your duties and employment and in the trade, hear of what was referred to as the Wise Plan for the Kansas City market?

MR. LASHLY: Of course, Your Honor, I will object to that question. If he heard rumor in the trade, I believe, is not proper evidence in the case.

THE COURT: Objection overruled. I think he can testify whether he heard of anything that was referred to as that and then I would require the witness to testify where he heard it, from whom he heard it and the circumstances under which he heard it. I will permit the general question. You may answer, Mr. Gilmore.

A. There was conversation in our office in regard to a program presented by the Sealtest Company, in our own company. I heard the information from Mr. Phillips, is where I got the information that I had in regard to what they — at that time, what they called a program such as that.

Q. And did you at the time in question see in Mr. Phillips' office a list or a sheet which was the Wise Plan or the Wise proposal?

MR. LASHLY: I object, Your Honor —

THE COURT: I will sustain the objection here. This witness testified he heard about a Sealtest plan, not a Wise Plan. You may make inquiry as to what he saw, but let the witness testify and not put words in his mouth. Objection sustained.

Q. Mr. Gilmore, was the plan which you just testified to at any time referred to as the Wise proposal?

MR. LASHLY: Object again, repetitious, Your Honor. He has already testified twice on that subject.

THE COURT: I do not think this question has been asked. You may answer that question.

A. To the best of my — I can't recollect what it was called. It was a program set up, or that Mr. Phillips discussed with me, that it was a program set up to try to get the marketing straightened out, or something to that effect. I can't recollect what — that it was called the Wise Plan or anything like that. I mean, that I remember that it was a program and I saw a list there, a price list, and I can't remember what was on that price list.

Q. Now, directing your attention to the early part of August, 1958, Mr. Gilmore, did you have occasion to attend a meeting at The Town House Hotel in Kansas City?

A. I attended a meeting at the Town House Hotel, yes, but I can't tell you what date it was.

Q. Was it approximately that time?

A. It could have been. I mean, as far as I know, it was along in there some time.

Q. Will you please tell us who, other than yourself, was present at that meeting?

A. Mr. O'Bryan was there with the Foremost Dairy, Mr. Vincent Crimmins with the Country Club Dairy, Mr. Jack Felts was there from the Borden Company, Mr. Phillips and myself, that I definitely remember was there.

Q. Was Mr. Augenstein of the Borden Company there?

A. That I don't remember, whether he was or not.

Q. Do you know how this meeting was arranged, Mr. Gilmore?

A. No, I do not. I was asked by Mr. Phillips to go with him to attend a meeting.

Q. Will you please tell us what the conversation was, what the parties said at that meeting?

A. I can't give you any definite information that anybody — any specific person said, but I do know that everybody participated in the meeting.

Q. What was said?

A. The meeting was held to try — the prices had been down so long, and we had gone along with the programs trying to get the marketing straightened out and the gist of the meeting was to determine if we could go up on our

products and if Sealtest and the other companies would go along with us so that we would have a fair margin of profit in our dairy products. We had been operating at a loss so long, we was trying to figure out some way of getting our products sold at a profitable price and that was the gist of the entire meeting.

Q. And was Mr. Wise's name mentioned in connection with that lowering of prices at that time?

A. I can't definitely say that it was, no.

Q. Mr. Gilmore, did you speak to me yesterday afternoon and again this morning about what your testimony would be before this jury?

A. Yes, sir.

Q. Do you recall what you told me your testimony would be?

A. I told you at the time that I —

MR. LASHLY: You Honor, may I interrupt? May I approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. LASHLY: This appears to be an attempt on the part of counsel — an opening of an attempt on the part of counsel, to impeach his own witness, and I want to know if the Government takes the position that this is a hostile, adverse witness?

MR. JINKINSON: Yes.

MR. LASHLY: And if so, what is the basis?

THE COURT: Is this an effort to impeach or an effort to refresh his recollection?

MR. JINKINSON: First to refresh his recollection, we are going to ask him if he recalls he said this. If it doesn't refresh his recollection, then we will ask the Court to impeach him.

THE COURT: Well, you don't get to that point unless he denies what he said.

Incidentally, the record can show at this time that about 9:30 this morning, in connection with the witness, Gilmore,

the Government directed my attention to all of his testimony before the Grand Jury and particular portions as to matter and material that might be desired for refreshment on Pages 2141 to 2142, and I want the record to show that I have read not only that matter, but all other related matter as they appear on Pages 2141 to 2148, so that if we get into that, you will know that I have checked it. That is a little apart from this question, but I think we will probably get into that pretty quick, too.

MR. LASHLY: First of all, I would like to renew the motion that Mr. Chadwell has heretofore made with reference to our right to inspect these minutes.

THE COURT: I understand that.

MR. LASHLY: Second of all, Your Honor, I want to strenuously object to the Government's procedure here. This witness is —

THE COURT: You mean as far as the question that is presently under examination?

MR. LASHLY: Yes, Your Honor. This witness is not a co-conspirator, his company is not a co-conspirator, he has no connection with any of the defendants in this case. If the Government, in talking to this witness before he takes the stand, concludes that his testimony would be in conflict with his Grand Jury testimony, they have no right to bring him to the stand and begin to refresh his recollection from prior testimony and impeach him and use by this means a device of introducing into evident his Grand Jury testimony.

THE COURT: I am going to permit the present question, because it calls for an answer as to what he did or did not say his testimony was going to be, and I think a party is entitled to know whether a witness is going to change within twenty-four hours of what he says he is going to testify to.

MR. LASHLY: May I inquire of the Government what their position is, Your Honor?

THE COURT: Sir?

MR. LASHLY: I would like to inquire of the Government what its position is with reference to this witness.

THE COURT: I think — what did he tell you?

MR. HOWARD: I will tell you. He said, quote — as he put it, and I want the record to show that at my suggestion —

MR. CHADWELL: I think you are going a little loud.

MR. HOWARD: — at my suggestion — thank you —at my suggestion, he wrote down the way he would put it on a sheet of paper, so that there would be no question that anybody would put it in a certain way or a certain word would be used that I might have inadvertently suggested in the examination.

THE COURT: Do you have that memorandum with you?

MR. HOWARD: He has it, but I copied it down. He has it in his own handwriting on his own paper. "All parties present discussed—"

MR. CHADWELL: Which period are you talking about?

MR. HOWARD: This is the Town House meeting—"discussed the Wise proposal that we had gone along with the lower prices and now what could be done to get cooperation from Sealtest to get prices high enough to get a fair profit."

THE COURT: He may testify to that now. I want to see whether he is or is not.

MR. CHADWELL: In the first place, you referred to the Wise Plan. He didn't adopt your language. I don't see there is anything inconsistent, the fact he wouldn't call it the Wise Plan.

THE COURT: I understand what the situation is. I am going to permit the question to go forward and see what this witness' testimony is going to be. I don't feel up to this point that the witness gives any impression as being other than careful.

MR. CHADWELL: I don't either, he certainly does not.

THE COURT: I think that is right, but I think we

will find out very, very quickly whether that first impression is an accurate one or not.

MR. CHADWELL: I don't think the fact that he disagrees with counsel means that he is hostile.

THE COURT: I don't think he has disagreed with counsel thus far.

MR. CHADWELL: He has not.

THE COURT: But he might, that is what I want to find out.

MR. CHADWELL: Even if he does, Your Honor, I just want to protest against the effort that the Government is making constantly by leading questions and otherwise to refer to the Wise Plan when the witnesses don't. I think it is prejudicial and inflammatory. I don't think that counsel should be permitted to continue to do it.

THE COURT: I don't think there has been any leading questions that have been harmful at all except in the characterization of the Wise proposal, and I think the record shows that the Court stopped counsel in connection with that on objection of counsel. Other than that, I don't think the questions have violated the informal rules that we discussed last night to move the case along. The problem of leading questions gets to critical questions and whether this was the Wise proposal or whether it was not the Wise proposal, it was a critical question, and for that reason, I sustained the objection and I will continue to do so.

MR. HOWARD: May the record show, Your Honor, in regard to the statement I made concerning what the witness told me —

THE COURT: Yes, you can develop that.

MR. HOWARD: That he said to me that at the time that they were discussing the going down of prices, that Mr. Wise's name and his plan and proposal was used. But when it came to the time that they were talking about going upward, then only the name Sealtest was used.

THE COURT: That is basically consistent with what he testified before the Grand Jury. The difficulty was that

you began to ask him questions in that context before he so testified from the witness stand and you got ahead of your witness and you can't get ahead of him until he testifies.

Very well.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

(Pending question was read by the reporter.)

THE COURT: You may answer that question, Mr. Gilmore.

A. What was the question? Do I recall that I told you what my testimony would be? I told you that I would say that in this meeting it was discussed as to how we could get our price — our prices had been down. We had gone along with the programs where prices had been down, and we had gone along with the programs to try to get it straightened out and what could we do to get the prices up, and if Sealtest would go up so that we would have a fair margin of profit on our dairy products which we had been operating at a loss for a long time, and that was the gist of the meeting to the best of my knowledge of remembering.

MR. HOWARD: May I inquire further?

THE COURT: Yes, you may inquire further.

Q. Mr. Gilmore, didn't we discuss and didn't you say that regarding the lowering of the prices that the Wise proposal or Wise program or Wise plan was referred to at that time but then when you talked about raising the prices, only the name Sealtest was mentioned. Did we discuss that?

A. Yes.

Q. And that is what you told me?

A. Well, to the best of my knowledge — I mean I can't tell you. I don't remember what happened in there.

Q. Is that what you told me?

A. Yes. Here's the thing. We was going over my testimony that I made in the grand jury. That was three

years ago. And you asked me today what I remember that went on there. What I testified then was a lot closer to the time now for my answers directly today in regard to that. Sure we had discussed that plan and we discussed it in the office before we went over there, or prior to the time of this meeting, and the prices were down, but the purpose of the meeting was to try to figure out some way to get them prices up.

Q. And that plan —

A. Had gone down, we was down, we were at rock bottom then and down to where we was losing money and we had gone along with the plans, where the prices were down, and our purpose was to try to figure out some way to get the prices up so that we could have a legitimate profit instead of a loss.

Q. But in our conversation, you did tell me that the Wise plan or program or proposal, whichever phrase you care to use, and the name of Mr. Wise was actually discussed when you said you went down on the prices and that only the name Sealtest was used when you were talking about going up, trying to get Sealtest to go up?

MR. LASHLY: Your Honor, I again object to the use of that phrase.

THE COURT: Mr. Gilmore, let me ask you this question: As you presently recall the discussions that went on then, both in your office and at the meeting at the Town House, and in connection with your testimony here today in which you referred to a plan, is there any distinction in your mind as to whether in the general conversation, as you presently recall, between what would be referred to if it was referred to as the Wise plan or what would be referred to as the Sealtest plan, or whether there was any real differentiation because I assume everybody knew that Mr. Wise did work for Sealtest?

THE WITNESS: That is right.

THE COURT: Now, in the discussion of this plan, did you understand there were two or possibly three different

plans, or what is your real recollection at the present time as to whose plan this was, if anyone's, and what the parties referred to it and what you understood was under discussion?

THE WITNESS: Well, to the best of my recollection today, I mean it was only general conversation in the industry that there was a program. As far as it being the Wise plan, that don't really ring a big bell with me. I mean there was conversation of not only Mr. Wise's but other people's names involved in that two-year period or year and a half period that we had all this problem. The prices were up and down everywhere, but there was conversation that there was a plan put out by Mr. Wise or supported by him and the Sealtest Company to bring the prices of milk down to eliminate all the fringe problems and all the headaches, that we had to get it — straighten it out, than there was steps to bring the price back up.

The purpose of the meeting was that, to the best of my ability to remember, was that we had gotten down to the bottom, we was clear down. What we was trying to do then was to determine among ourselves, which they were not present and the people that was trying to figure out some way to get these prices back up and our only purpose at that meeting was to study this, and figure out what we could do to bet the prices back up to where we just get an ordinary legitimate profit, which we had been operating at a loss for such a long period of time and the companies we worked for — that I worked for was concerned with, myself, and Mr. Phillips, and they was starting to get back in the money and they was trying to work out something to get these prices up to where they would be stable, and that was the purpose of the meeting and that was what was discussed.

Now, whether it was referred to as the Wise plan or the Sealtest plan, I can't definitely say today. I don't remember that distinctly on that particular meeting or on that meeting. That is the one that I attended.

(R. 822-823)

(CROSS-EXAMINATION)

Q. Now, Mr. Gilmore, you were testifying here under direct examination by the Government that the price of milk went down in July of 1958, if I recall correctly, did you not, and that thereafter you attended a meeting at the Town House and talked about its going back up and so on?

A. I don't remember any specific dates on it. I would hesitate to say when it went down. I know the prices were down, up and down, in that period of time.

Q. By the time you went to the meeting at the Town House, the price had come down — by the time you went to the meeting at the Town House, the price had already come down, it was down then?

A. The prices were down in that period of time. Now, what they were at the time this meeting took place, I don't know.

Q. You think it possible that that meeting could have occurred, we will say, in early June of 1958?

A. As I answered him, I don't remember the date of the meeting.

Q. It could have been in June or it could have been in August, you just don't know; is that a fair statement?

A. At this time, I mean with the time that has elapsed, I don't remember the date when that meeting took place.

(R. 824-829)

(COLLOQUY OFF THE RECORD.)

THE COURT: Let the record show that in connection with the utilization of any Grand Jury testimony for the purpose of refreshing the witness' — this witness or any other witness' recollection, that the objections and motions made by the defense shall be considered as a continuing objection in regard to the use of Grand Jury testimony at any time by any witness.

MR. CHADWELL: The motion is what I am more interested in.

THE COURT: And the motion shall also be applicable to the utilization of that testimony as heretofore stated in the record.

REDIRECT EXAMINATION

BY MR. HOWARD:

Q. First, may I ask you, Mr. Gilmore, you recall stating in your direct testimony that your best recollection that the Town House meeting you testified about occurred during the early part of August, 1958?

A. I think that I said I can't remember when the date of that was, and I don't, really, I don't remember the date of that meeting.

Q. Did you testify before the Federal Grand Jury that was investigating this case?

A. I did.

Q. And solely for the purpose of refreshing your recollection, I would like to read part — from part of the transcript the following questions and answers, reading from transcript Page 2139:

"QUESTION: He attended those meetings alone?

"ANSWER: That's right — wait just a minute, I will correct that one statement. Right at the tail end of it I attended one meeting with Mr. Phillips but I can't remember now for sure where it was, but I think it was at the Town House in Kansas City, Kansas, that I attended one meeting there with him."

THE COURT: Pardon me just a minute, Mr. Howard.

Mr. Gilmore, in order that you get the context in which the questions and answers that have just been read to you, you had been examined just prior to this as to whether or not you had personally attended a meeting at the Ambassador Hotel and you indicated that you had not. Then you were asked whether you had attended any meetings except Union meetings with Mr. Phillips, and you indicated that

Mr. Phillips had not asked you to attend meetings. And then the question — and I will re-read those:

"QUESTION: He attended those meetings alone?

"ANSWER: That's right — wait just a minute, I will correct that one statement. Right at the tail end of it I attended one meeting with Mr. Phillips, but I can't remember now for sure where it was, but I think it was at the Town House in Kansas City, Kansas, that I attended one meeting there with him."

That brings you up to the point and counsel will read the other.

MR. HOWARD: Thank you, Your Honor.

"QUESTION: When did that meeting take place as best you can recall?

"ANSWER: That was in the latter part of 1958, the meeting I attended then.

"QUESTION: Was that just before prices went up on October 1?

"ANSWER: No, that would have been before then, it was probably in September.

"QUESTION: Do you remember prices went up on August 27th to a 33¢ level?

"ANSWER: That's right, that could have been one.

"QUESTION: Just before the price change?

"ANSWER: That's right.

"QUESTION: Who attended that meeting?

"ANSWER: Mr. O'Bryan, Mr. Phillips, myself, Mr. Crimmins, Mr. Jack Felts, if I remember correctly, and I can't remember anyone else attending that meeting."

Now, Mr. Gilmore, do you recall that those questions were asked of you and that you gave those answers at that time before the Federal Grand Jury?

A. If they are there, no doubt that those questions were asked me at the Grand Jury. I remember them asking me about a meeting at the Town Hquse Hotel, that is true, and asked me who was there. But I mean the date that I gave them that the meeting took place, I don't remember what

I told them because I don't remember today when the meeting was.

Q. Well, the reading by me of these questions and answers from your Grand Jury transcript refreshes your recollection as to what you testified then?

A. That's right, and I told the people — I told them at the time and that is the way it actually happened and that was as close to the date as I could get. That is true.

Q. And that is the same testimony you would have today having been refreshed by this?

A. If I could have remembered it, then that would have been the date that I would have give you today. I would have given you the same thing. But that was three years ago that I was examined by the Grand Jury. And being out of the dairy business, I have dismissed it. I couldn't tell you, but if that is what I testified there, then that is right. That was when I went to the meeting, as close as I could give them at that time.

Q. Well, do you recall that you were asked these questions and that you gave these answers at that time?

A. Yes.

Q. What is your answer?

A. Yes.

MR. HOWARD: Thank you.

THE COURT: Any further questions?

MR. HOWARD: I have no further questions.

ARTHUR AUGENSTEIN
Borden General Manager

(R. 997)

Q. Mr. Augenstein, did the time come when you heard about a discount offer to Milgram Food Stores by Meyer Dairy, subsidiary of Hawthorn-Mellody?

A. Yes.

Q. When did you first learn of it, sir?

A. I am not sure of the exact date, but I would estimate around August of 1957.

Q. From whom did you hear of it?

A. Stuart Wien.

(R. 999 - 1023)

Q. And I take it you have related what amounts to a series of conversations?

A. It was more than one. It was two or three, at least, calls that we made before we were able to be fairly well convinced that he had a 13 per cent discount offer.

Q. Did you grant the Milgram Food Stores the same type or a similar type discount?

A. We did later.

Q. About when?

A. October 1, 1957.

• • •

Q. And how did it come about that you did grant them the 13 per cent discount?

A. They indicated to us that Sealtest was giving them an increased discount.

Q. At this time, in October of 1958, what dairies were supplying the milk of Milgram in Kansas City, Missouri?

A. Sealtest and Borden.

Q. And in what ratio were you supplying that account?

A. We never knew what Sealtest sales were. We only knew what our own had been.

• • •

Q. Did you attempt to verify that statement, the truth of it, before you offered him the discount?

A. Yes, I did.

Q. What did you do?

A. I saw Glen Phillips one day after some dairy counsel meeting, I think, at the Union Station.

Q. I am sorry, sir, I am not sure I communicated with you. Did you attempt to verify the fact that Sealtest had given the discount to Milgram Food Stores?

A. Yes.

Q. And how did you do that?

A. We went to Chicago. Mr. Pentz — I had, of course, kept Mr. Pentz, my immediate superior, informed of the discussions that I was having with the Milgram people, and he wanted to know whether I had verified it with Sealtest. I said I hadn't been able to. So in September of 1957, Mr. Pentz asked me to meet him in Chicago, and we went to see Mr. Wise, and at that time we tried to verify from them if they were giving a discount to Milgram or whether they had heard of the discount.

They had, but we were never able to find out from them anything concerning the discount other than we felt that the 13 per cent figure apparently was the amount.

Q. All right. Now, let me back up with you a moment. After first learning from Mr. Wien that such an offer had been made, did you have a discussion with Mr. Phillips?

A. Yes.

Q. And who is he?

A. He was manager of the Meyer Sanitary Milk Company.

Q. Where did you discuss the matter with him?

A. In front of the Union Station.

Q. About when?

A. I frankly can't recall the date.

Q. Can you place it in terms of when you first learned of it from Mr. Wien?

A. Yes, somewhere in August.

Q. Not too long afterward?

A. That is correct.

Q. Will you relate the conversation you had at that time between yourself and Mr. [Phillips]?

• • •

A. I asked Mr. Phillips if they were quoting a high discount, that I had heard of 13 per cent, and as I recall, I looked him right in the eye and he said, "No," and I think I repeated the question and again he said, "No."

Q. What else, if anything, did you say to him, sir?

A. I think I stated that if what I had heard that there was a higher discount, that my query was how they could justify that great a discount.

Q. At the time of this conversation had you ever been advised of the 13 per cent figure?

A. We were pretty sure that that was what it was. I don't recall if we knew exactly at that time. Frankly, I never did — we never did get anything to definitely set up that it was a 13 per cent offer.

Q. What else, if anything, was said at that discussion?

A. In substance that is about all the conversation. It wasn't a very long conversation.

Q. Did you state to him that if there was that much discount possible, that your prices were too high?

A. I could have made a statement along that line, because we operate normally with a very narrow margin of profit, and it allows only small discounts, that if there is a large discount then there must be too much margin in our business and we normally have never operated with anything except a very narrow margin.

Q. Did you suggest that it might lead to a reduction in prices?

A. I don't think so.

Q. What is your best memory on this particular topic of what you said to Mr. Phillips?

A. I don't recall any more than what I stated, sir.

Q. Well, did you say that if he could offer such a large discount that the logical thing to do would be to reduce prices?

A. I don't believe I have ever made that kind of a statement.

Q. But is there a possibility you could have made such a statement, sir?

A. I don't think so, because through all of this period we never — my company, and myself, never reduced prices.

The only time we made any price change was when we had proof that we were meeting a competitive price.

MR. HERNACKI: At this time, Your Honor, the Government would like the opportunity of attempting to refresh the witness' recollection by reading from Page 2283 and 84 —

THE COURT: Yes, the last question on 2283 down to the middle of 2284.

MR. HERNACKI: Correct, sir.

MR. PURCELL: May we approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. PURCELL: I realize the Court has ruled on this, but we want to renew our motion previously made as to the similar grand jury testimony, that is, that the defendants be permitted to inspect and examine and be aware of not only those portions marked by the Government and to be read to the witness, but those relating in any way to such portions.

MR. JINKINSON: Couldn't we have a standing objection to this —

THE COURT: There is a standing objection.

MR. PURCELL: It is not an objection, it is a motion.

MR. JINKINSON: Well, motion.

THE COURT: The record may also show that the defense may have a standing motion to the utilization of any grand jury testimony in the manner in which we had proceeded up to this point.

MR. JINKINSON: Yes.

MR. CHADWELL: Very well.

MR. JINKINSON: Without the necessity of making a record every time.

MR. HERNACKI: Could I trouble you for the date of the grand jury session?

THE COURT: Your present one is Volume 13, June 30, 1959, Pages 1028 to 1172. You also have Volume 8, which is Pages 1356 to 1544, October 20, 1958; Volume 15, Pages 2525 to 2603, July 2, 1959. . . . Those are the ones you have indicated on the prior memorandum. The record should show I have read all those pages. I want the record to show that I have read all the suggested passages and I want to call Government counsel's attention, in the hearing of counsel for the defense, that I will not permit the Government to read point No. 10 on Pages 2303 and 2304 for the reason that I do not think that the testimony there could reasonably be said to tend to refresh the witness' recollection on that point.

I will be glad to hear you out of the presence of the jury, but I think if you will check that, you will agree with me that that is true. Either that or I misunderstand what you are getting at.

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(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

Q. Mr. Augenstein, you testified before the Federal Grand Jury here in Kansas City several times, did you, sir?

A. Yes, sir.

Q. And you recall that one of those occasions was June 30, 1959, sir, thereabouts?

A. Yes, sir.

Q. I should like at this time, Mr. Augenstein, to read to you a portion of the testimony given at that time and then ask you some questions about it, sir.

"QUESTION: Do you recall telling him"— now this referring to the discussion with Mr. Phillips — "that there was a good possibility that this large discount that he was granting to Milgram's and if it was not withdrawn that a price break was liable to occur on this market?

"ANSWER: As I recall, now that you mention that, I probably stated to him that if there was that much discount

possible, that our price was too high, and the logical thing to do was to reduce the price.

"QUESTION: So you warned him that that might be the consequence of his large discount offer if it was not withdrawn?

"ANSWER: Yes, that was my personal feeling that if we were making so much money on milk, then our price was too high, if we could afford to give that type of discount.

"QUESTION: And you so stated to Mr. Phillips?

"ANSWER: I believe that is right."

Were you asked those questions, Mr. Augenstein, and did you give those answers before the grand jury?

A. My memory at that time would be clearer than it is at the present time. If I stated that, that is as I recalled it at that time.

THE COURT: Mr. Augenstein, let me ask you if having had those questions and answers read to you refreshes your recollection at this time as to what you told Mr. Phillips on that occasion?

THE WITNESS: Not any clearer, I don't believe.

THE COURT: Well, as clear. That is what I am getting at.

THE WITNESS: It has been a long time ago and my first statement was "as I recall it," and what they read to me apparently was as I recalled it at that time.

THE COURT: Do you remember, presently recall it now, having heard that testimony read to you?

THE WITNESS: Makes it no clearer, actually, in my mind.

THE COURT: Well, I don't quite understand your answer as to whether it makes it as clear.

THE WITNESS: Well, things that happened back at that time are rather hazy to me at this time, and if I made the statement in front of the grand jury that he read to me, why, that is as I recall it, and maybe more accurate than my present recollection.

THE COURT: Very well.

Q. Mr. Augenstein, you related that you had gone to Chicago to see Mr. Wise, you and Mr. Pentz?

A. Yes, sir.

Q. Did that occur about September 10, 1957?

A. That is correct.

Q. And where did you go — this is in Chicago, is it?

A. Yes, sir.

Q. Where did you go in Chicago to see Mr. Wise?

A. Mr. Wise's office.

Q. And this was at what time of the day?

A. Oh, I would estimate 10 o'clock in the morning.

Q. When you arrived, who did you find there?

A. Mr. Stewart, Mr. Flanagen, Mr. Wise and Mr. Gardner.

Q. Mr. Stewart, is he here in the room?

A. Yes, he is.

Q. About where is he sitting?

A. He is sitting right there in the last row (indicating).

Q. Next to Mr. Wise?

A. Yes, sir.

Q. Will you state what the discussion was as best you can, telling us what party said what at this time?

A. Well, as I recall the meeting, Mr. Wise did most of the talking. He reviewed the market in Kansas City from the early forties with the reduction of paper up to the present time, which included the introduction of gallon jugs in the Kansas City market. He had some idea of the volume, apparently, of gallon jugs. I don't recall the exact figure that they thought gallon jugs represented as percentage of sales, somewhere between 8 or 10 per cent, I believe, and I, of course, didn't do much conversing in this meeting, but I do recall stating that I thought the figure was too high. I had called the market administrator, I believe in August, and asked him because he had the only accurate figures that were available in the market.

Q. Why did you call the market administrator to find out, sir?

A. Well, I was interested in knowing how big the gallon jug sales were in the Kansas City market.

Q. Did you anticipate some point would be made of that figure?

A. No.

Q. Would you proceed with your relation on the conversation in Mr. Wise's office?

A. The figures that I got from the market administrator, as I recall, was somewhere between 2 and 3 per cent.

Q. This is the share of the total milk sales had by the gallon jug operators?

A. By the gallon jugs. In substance, that pretty well covers the conversation.

Q. What you have just stated is what Mr. Wise stated at the meeting, the discussion about the history of the market and such?

A. Yes.

Q. Now, what was — what point did Mr. Wise make as he related this history, what was the point of it?

A. Well, I think he was concerned about the sale of the gallon jug, and as I recall, I believe Mr. Pentz felt that our company would like to meet the gallon jug with a gallon jug. Mr. Wise differed with that, I know, and I believe pointed out one of the other markets where they had had some experience with gallon jugs.

Q. What city was this?

A. I believe it was Washington, D. C.

Q. And what experience, if any, did Mr. Wise describe in Washington, D. C.?

A. I really don't recall, except that their experience apparently had been rather unsatisfactory.

Q. Did Mr. Wise say at any time in your hearing that the gallon jug should be met with half gallons of paper?

A. Yes, I think he felt that way.

Q. I hadn't quite finished my question, sir. I am speaking too slowly, I am afraid — at the same price, in other words, at the same price level as the jugs.

A. I don't recall him ever st[illegible]ing at the same price except that I think that he felt that half gallons of paper should be used to meet the gallon jug competition.

Q. Yes, sir. And did he ever state that not only should be met with two paper half gallon cartons, but it should be met by reducing the price of the paper cartons to whatever level the jugs had been going to?

A. I don't recall him making that statement.

Q. At any meeting anywhere, how many times had you met Mr. Wise?

A. I believe three times in this period of '57 and '58.

Q. Well, on any one of those three occasions, did he ever say anything like that?

A. I don't believe so.

Q. In any language, you understand, I am not confining it just to those words.

A. Yes. I don't recall that he ever made a statement that he would meet gallon jugs with paper half gallons at the same price that the jugs were selling for.

MR. HERNACKI: At this time, Your Honor, the Government would like to attempt to refresh the witness' recollection by reading from Pages 2289 —

THE COURT: 2289 or 2290?

MR. HERNACKI: 2290 and 91, I am sorry, sir.

THE COURT: Read the last question on Page 2290 and the answer to that question as it is continued on page 2291.

MR. HERNACKI: Yes, sir.

Q. Again, Mr. Augenstein, I would like to refresh your recollection by reading a passage of the Grand Jury transcript, testimony given on June 30th, 1959, sir. Would you just listen to what I say and then I will ask you about it. This is the reference to Mr. Wise now.

"QUESTION: Just a substance of what he said where you got this impression that the way to cure it, the only way to cure it"— this being the gallon jug situation — "would be to reduce prices?

"ANSWER: Well, I believe he's made the statement that

the only way to meet the gallon jug price would be to meet it with half gallons of paper, and, of course, that meant reducing the price to whatever level gallon jugs had gone."

Were you asked that question and did you give that answer at that time, sir?

A. Yes, sir.

Q. Does that help you in any respect to recall what Mr. Wise said on the subject of meeting the gallon jug?

A. Well, in order to meet the gallon jug with two half gallons of paper and if gallon jug prices do go down, you have to reduce the half gallons of paper if you are going to meet it with them. And I believe my statement there is simply a verification of that same idea.

Q. Yes, sir. But what I am asking, is, does this remind you as to what Mr. Wise said about meeting the gallon jug?

A. Only that he would meet it with half gallons of paper.

Q. And do you recall, now, anything about what level he was going to meet it at with the half gallons of paper?

A. No, and I don't believe he ever made a statement as to what level he would bring the price of half gallons in relation to the price of gallons.

Q. Now, what was said at the meeting, Mr. Augenstein, about the thirteen percent discount? You mentioned it was discussed. Will you state again exactly what was said about it?

A. Well, we were trying to verify whether the figure that we had been trying to get from the Milgram people was the same figure that they probably had been told by the Milgram people.

Q. Did they tell you what the offer was?

A. No, they did not.

Q. What did Mr. Wise say in response to your inquiry?

A. Well, only that they were aware of the offer and we were confident that they knew about it, there wasn't any question about that.

Q. Did Mr. Wise offer any thought as to what should be done about it?

A. None whatsoever.

Q. Did he at any time suggest in the meeting that the prices may have to go down to eliminate this sort of thing?

A. No, sir.

Q. In any language, again, sir; I am not confining it to those words, you understand that?

A. I don't recall any such inference or statement made by him.

Q. Did you or Mr. Pentz suggest that he come with you to see Mr. Young?

A. I think Mr. Pentz had a luncheon engagement with Mr. Young and I think he invited Mr. Wise to go along.

Q. And did he say to get Mr. Young to withdraw the discount — rather the offer?

A. No, sir.

Q. What is your best recollection as to why he wanted to see Mr. Young, did he express himself at the meeting as to the purpose of seeing Mr. Young?

• • •

A. Would you repeat that question?

Q. I will restate it, sir, simplify it. Did Mr. Pentz state at the meeting the purpose in seeing Mr. Young, which he had in mind?

A. No, he was going to ask Mr. Young if they had made this offer to the Milgram people, because I hadn't been able to find out from the local manager of their company that they had made such an offer. And as Mr. Young was Mr. Phillips' boss, so we were going to ask him.

Q. Now, you say the meeting was in the morning. Did you go and have lunch with Mr. Young?

A. Yes, we did

Q. You and Mr. Pentz?

A. Yes.

Q. And where did you meet?

A. I don't recall, it was the dining room in one of the downtown hotels in Chicago. I don't recall the place.

Q. Was anyone with Mr. Young?

A. Yes, I believe a Mr. Raymond was with him.

Q. And that is the same day?

A. Same day

Q. And will you state, now, what conversation took place, naming as best you can remember who said what?

A. Why, I think Mr. Pentz asked Mr. Young about the discount, whether it had been offered, the amount of it. Mr. Young was very evasive. As far as I recall, he never stated that such an offer had been made.

Q. What else, if anything, was said?

A. That is about all that I can recall of the conversation.

Q. Did Mr. Pentz ask the same question you asked Mr. Phillips, how could he justify so large a discount?

A. I don't recall, but it is possible that he could have asked him the same question.

• • •

Q. I am sorry, did Mr. Pentz say to Mr. Young that that sort of a maneuver in the market could lead to a price reduction?

A. I don't believe so.

Q. Do you recall anything said on this particular point as to what the consequences could be of his continuing this offer?

A. No, because he would never admit that they had made such an offer.

Q. But that didn't convince you that he had made it, did it?

• • •

A. Well, we think highly of the Milgram people, and we think they are honest, they are good buyers. They try to get the lowest price. But I don't believe they would lie to us. So we were pretty well convinced that what they were telling us was correct.

Q. So notwithstanding Mr. Young's statement to you

and to Mr. Pentz, you continued to discuss the discount offer?

A. There was discussion on it along the lines that I have stated. I don't recall anything further.

MR. HERNACKI: At this time, Your Honor, the Government would like to attempt to refresh the witness' recollection by reading from Pages 2287 and 88 of the Grand Jury transcript.

THE COURT: 2286 and 2287?

MR. HERNACKI: I am sorry, yes, 2286 and 2287.

THE COURT: Very well.

Q. Again we will follow the same procedure, Mr. Augenstein, and again this is from the testimony of June 30, 1959:

"QUESTION: (By Mr. Mann) Now, will you tell us the conversation you had with these gentlemen?

Meaning Mr. Young and Mr. Raymond at this luncheon.

"ANSWER: Well, frankly, as I recall, I didn't do much of the talking myself. I think Mr. Pentz talked to Mr. Young about this discount that he had offered to Milgram's, which we had to meet, and as I recall, he tried to inquire what his thinking was and what — how he came about justifying that large a discount.

"QUESTION: Isn't it true that Mr. Young was told that if the discount was not withdrawn that a price war would occur on this market in Kansas City as a result of it?

"ANSWER: I don't recall that exact statement in that manner. It no doubt was mentioned due to the fact that that sort of maneuver in any market, I am sure, with past experience, would bring on a reduction of price. There was only one way to wipe it out, as I see it, when you have that big a discount, and that would be probably to lower the price of milk.

"QUESTION: Weren't you more or less stating the sentiments of Mr. Wise that he felt that that was the way to meet this thing, was to have a price drop? You had already gone to Mr. Wise's office, had you?

"ANSWER: I think that is right.

"QUESTION: So isn't that true, that you were sort of repeating what his sentiments were about it, the way to cure it was to have a price drop?

"ANSWER: The discussion probably had been along that line, and we were probably mentioning that it was not only, perhaps, his thinking, but Mr. Pentz' and my thinking, too."

Were you asked those questions and did you give those answers, Mr. Augenstein, at that time?

A. Yes.

Q. Does that refresh your recollection in any way as the conversation at this time?

A. Yes, and a statement such as that indicates to me that my previous statement that I had made that that large a discount apparently indicated that our prices were too high, our margins were too great to allow.

Q. And isn't that what Mr. Pentz said to Mr. Young?

A. I believe the discussion was along a line where this sort of thing had happened in markets.

Q. Did Mr. Pentz indicate that this was Mr. Wise's thinking, also?

A. I don't recall, frankly.

Q. What is your best memory as to what Mr. Pentz said about Mr. Wise's views?

A. Well, Mr. Wise's views, Mr. Wise never came out with a flat view.

Q. Did Mr. Wise—was he pleased with the knowledge of this discount offer of Hawthorn-Mellody to Milgram's?

A. I frankly don't know.

Q. What did he say about it at the meeting on September 10 in his office when you were there?

A. Very little about the discount.

Q. Did he say he was going to meet it?

A. We asked him that and he said he didn't know what he was going to do.

Q. Did you want to meet it?

A. Frankly, I didn't, personally.

Q. It would have meant a substantial lowering in the income to be received from Milgram's if you had granted it?

A. Yes, it would.

Q. And also on Sealtest part?

A. I am sure it would.

Q. Well, had Mr. Wise in the meeting with you indicated that this could lead to a reduction in prices?

A. No, he did not.

Q. Well, now, did Mr. Pentz say anything at all with regard to Mr. Wise and this discount offer of Hawthorn-Mellody?

A. To Mr. Young?

Q. To Mr. Young.

A. I don't believe so.

Q. Or to Mr. Raymond?

A. Not that I recall.

Q. Now, a drop occurred in the price in milk in Kansas City about September 13, 1957, isn't that right, sir?

A. That is right.

(R. 1027-1029)

Q. Did you, Mr. Augenstein, discuss the drop of price that was coming in the market with anybody else in the dairy business outside your company?

A. I didn't know that there was going to be a drop in price.

Q. Well, did you learn of the drop — you mentioned you had some information. Was this information received before the day which the price decrease was to become effective?

A. I am not sure whether it was September the 12th or September the 13th, but I am sure my record will show which date I got the notification.

Q. And on September 13th, the price dropped, is that correct, sir?

A. Yes, it did.

Q. On September the 12th, Mr. Augenstein, did you discuss the drop in price with anybody else in the dairy business outside your company?

A. Yes, I think I talked to Howard Adams.

Q. And how did you contact him?

A. As I remember, I ran into him in the lobby of the Muehlbach Hotel after a Rotary luncheon.

Q. Didn't you telephone him before that?

A. Not that I recall. It is possible that I could have.

Q. Is it possible that you did telephone him and tell him there was going to be a drop of prices in the market?

A. I don't recall that I did. My only recollection is that I talked to him in the lobby of the Muehlbach Hotel.

Q. Well, would this refresh your recollection, that you told Mr. Adams that the price drop was coming, that it would be of some duration, and that he might want to think about restricting the extent to which the price decrease would be in effect; in other words, the geographical area?

A. Not that I recall.

Q. And that after this information was communicated to him over the telephone, he pressed you for more information and you told him to meet you at the Muehlbach?

A. I don't recall it occurring in that manner whatsoever. My only recollection is — I know I talked to him, I talked to him in the Muehlbach.

Q. Well,—

A. And I am sure that I talked to him about the discount that we had discovered was being offered in the market.

Q. Would you say there was no such telephone conversation before the meeting in the Muehlbach?

A. I am in no position to say, because I frankly don't recall.

Q. Now, when you met Mr. Adams in the Muehlbach, where did you meet him?

A. In the lobby.

Q. And did you have a discussion there?

A. Yes.

• • •

Q. Will you relate the conversation had at that time telling us as best you can, who said what?

(R. 1030-1035)

A. I told him about the discount that we had run into in the market. I thought perhaps he might have run into the same thing. I don't recall that he had. At least, he didn't say whether he had or not.

Q. Well, what else did you tell him?

A. I told him about the price drop. At that time, I think it was a one cent a quart and four cents a half gallon.

Q. You told him it was coming?

A. It had already been announced.

Q. Whether announced or not, it wasn't in effect, was it?

A. I think it was in effect that day or the next day.

Q. The next day it was going to be in effect?

A. That's right.

Q. And you told him that was coming the next day?

A. That's right.

Q. All right. What else did you say?

A. Mr. Adams, if I remember right, told me that he was going to drop the price two cents a quart and four cents a half gallon.

Q. For what reason?

A. I do not know.

Q. Did he say that a one cent drop on a quart while four cents on a half gallon wasn't in proportion?

A. I don't recall any statement that he made like that.

Q. What else did you say?

A. I am quite sure that in the discussion concerning the discount that I—we speculated perhaps on maybe this was what caused the drop.

Q. You say you speculated?

A. Yes.

Q. Didn't you tell him that was one of the causes of the drop?

A. I didn't know that, I didn't drop the price, and I sure didn't know why Sealtest had dropped the price.

Q. Well, did you or did you not tell him that that was one of the causes of this price drop that was coming the next day?

A. I think that I speculated that it possibly could be part of the cause.

Q. What did you say sir?

A. That this discount was in the market and that this probably was one of the reasons for the drop.

Q. And you told them who was dropping the price too, did you not?

A. Sure.

Q. Who was it?

A. Sealtest.

Q. Did you mention any other factor as being a cause of the price drop?

A. Not that I recall.

Q. Didn't you mention gallon jugs?

A. I don't recall any reference to gallon jugs at that particular time.

Q. What else do you recall about that conversation?

A. I would say that was about the extent of it.

MR. HERNACKI: At this time, Your Honor, the Government would desire to refresh the witness' recollection by reading from Page 2297 of the transcript.

THE COURT: Is this in further connection with the conversation —

MR. HERNACKI: Yes, sir. Before doing that, may I ask another question?

THE COURT: Yes.

Q. Mr. Augenstein, did you say anything about National taking pictures of low gallon jug prices?

A. Not that I recall, but that was pretty well known, that they had.

Q. Did you say this in connection with it being a reason for the price drop coming?

A. Not that I recall.

MR. HERNACKI: If I may, Your Honor, I would like to read from that portion at this time.

THE COURT: Yes, I think the question and answer there at the top of Page 2297 would be sufficient, Mr. Hernacki, starting with, "Will you tell us what you told him," and the answer to that question, the next question and the answer to that question.

• • •

Q. We will follow the same procedure, Mr. Augenstein.

"QUESTION: Will you tell us what you told him"—meaning Mr. Adams.

"ANSWER: I think I notified him that there was a larger discount being offered in the market, and as far as I could tell that was what brought the price down.

"QUESTION: Did you also mention the fact that gallon jugs—that National had been taking pictures of some of the low prices on gallon jugs, and that that was one of the reasons they had given for dropping the price?

"ANSWER: I believe that is right."

Were you asked those questions, sir, and did you give those answers?

A. If the record shows that, that is exactly what I did, that that is exactly as I remember it.

Q. Does that bring anything back to you, the picture-taking of the low gallon jug prices?

A. Yes, I think we knew they were taking pictures of the gallon jug —

Q. Did you mention that to Mr. Adams as one of the reasons for the drop?

A. If the record says I did, then I must have talked to him about that.

(R. 1062-1066)

Q. On June 13, 1958, was there a meeting in Kansas

City at the President Hotel of various dairy representatives?

A. Yes, there was.

Q. Will you tell us, Mr. Augenstein, how you came to get there?

A. Mr. Pentz, my immediate superior, came to Kansas City and asked me to accompany him to a meeting at the President Hotel. Mr. Wise was there and Mr. Edquist and Mr. Callender, and I believe Mr. Stewart and Mr. Gardner. I am not sure that I have named the exact people there, but most of those, I am sure, were there.

Q. Mr. Flanagan, was he there?

A. I don't recall him being there.

Q. Will you state, Mr. Augenstein, what was said at the meeting, telling us who said what?

A. This was a question that was asked me in front of the grand jury and at that time the only recollection of any statement that I could recall was by Mr. Wise indicating that most of us were more interested in profits than we were in a sound market, and Mr. Edquist's immediate reply to that was, I believe, that he was interested in profits, that is why he was in business. Outside of that, I couldn't give you any further statement that I recall being made.

Q. Did Mr. Edquist say he wanted to raise prices in any language?

A. I don't recall that.

Q. Did Mr. Pentz have that point of view?

A. No, but Mr. Pentz wanted me to make a profit in my operation. This I know.

Q. Did Mr. Edquist say that the losses his company was incurring in Kansas City were affecting his profit and loss for the entire company?

A. I don't recall that statement.

Q. Did he in any way say anything suggesting a desire to raise prices?

A. Not that I recall.

Q. Did anybody say anything about raising prices?

A. Not that I recall.

Q. Did anybody say anything about lowering prices?

A. No.

Q. Did Mr. Wise say he thought prices would have to go lower before they went higher?

A. Not that I recall. I only recall the statement that I repeated, that I remembered, after it was suggested to me, I think, by Mr. Jinkinson when he refreshed my me, I think, by Mr. Jinkinson when he refreshed my memory back in my appearance in front of the grand jury and when he did that, I recalled such a statement being made, and I so stated. But even when they asked me originally, I didn't recall that statement.

Q. You say Mr. Wise indicated he was very concerned over getting the market stabilized, words to that effect, sound market?

A. Well, that was his statement, was that the others were more interested in profit than a sound market.

Q. Did he state why the market was not sound, in his judgment?

A. Not that I recall.

Q. Well, what did he say about the conditions in the market?

A. I am sorry that I can't be more specific, but I just don't recall the conversation.

Q. Did he say anything about the gallon jug spread?

A. I don't remember any statement concerning the gallon jug spread.

Q. Did he say anything about the gallon jug, in substance?

A. I imagine gallon jug prices were mentioned.

Q. Is that the best of your recollection?

A. As far as I can recall.

Q. By Mr. Wise?

A. That is correct.

Q. What do you recall, if anything, about what he said about the gallon jugs?

A. Well, gallon jug prices, I am sure, were discussed, because they were rather low, if I remember right, at the time.

Q. At the time most all prices were low, weren't they?

A. Yes, there was considerable amount of what I would call area pricing, where Adams and Sealtest had met the jug stand, and we had to meet our competition and drop our prices in certain areas. Our prices were changed from hour to hour some days on trying to keep up with our competition.

Q. Did Mr. Wise say anything about this area pricing or spot pricing?

A. I can't recall, sir.

Q. Did he say the market wasn't sound?

A. He so indicated in a general statement that I made a moment ago—

Q. Did he say it wasn't the time to raise prices?

A. I don't recall that sort of a statement being made.

Q. Do you recall any sort of a statement on this point?

A. No, I cannot.

Q. Did Mr. Wise say he was going to prepare some price studies of price lists?

A. Not that I know of.

Q. Did he say anything about a discount schedule?

A. Not that I recall.

Q. At this meeting, Mr. Augenstein, was there any discussion of the discount proposal you had?

A. I had none at that time, I am sure.

Q. Is it possible that you had a discount proposal which was discussed at this meeting?

A. No. If there was any discount proposal discussed, it was a discount—it was probably on a dollar basis in some other market.

Q. Now, who brought this up?

A. I am not sure, but it seemed to me that— I had been looking at some other discounts and I know I didn't bring

it up, because if I recall correctly, I don't think I said a thing at this meeting.

(R. 1068-1078)

Q. Did Mr. Wise say either he or his company or anybody in it were going to try to come up with some price lists or price studies or some study of any kind?

A. I do not recall such a statement being made at that June 13th meeting.

Q. In substance, anything like that?

A. I recall nothing along that line at all.

Q. Did he indicate he was going to do anything?

A. That was one thing that usually, when you were with Mr. Wise, he never indicated he was going to do anything.

Q. And how did the meeting end, on what note?

A. I don't know. Frankly, I don't recall.

Q. Nothing came out of the entire meeting?

A. Nothing whatsoever.

Q. Did Mr. Pentz suggest to Mr. Wise you ought to meet the gallon jug with another gallon jug?

A. I think he probably did at that time. I know he had on occasion, I don't know whether it was at that meeting or not.

Q. Mr. Edquist have that view, did he express that view at the meeting?

A. Yes, I think Mr. Edquist felt the same way.

Q. What did Mr. Wise say about it?

A. Well I don't recall what he said, but I am sure he hadn't changed his opinion from the one we had gotten from him before, that he felt like meeting the glass jug with half gallons of paper.

Q. Did he say that wasn't his policy, at this meeting in June '58?

A. I don't recall him making that sort of statement, sir.

• • •

Q. I think we had left off—we were about to begin a discussion of the next meeting you had with Mr. Wise on June 20th of 1958, you do recall that, sir?

A. Yes, sir.

Q. Will you state how you came to go to a meeting with Mr. Wise at that time?

A. I got a call one afternoon from Mr. Stewart. He stated that Mr. Wise was in town, they would like to talk to me and I told Stewart I was [quite] busy at the time, that as soon as I got my work cleared up, I would come down. However, I had an appointment early that evening, I wouldn't be there very long. So it was sometime after 4:30 I went down to the President Hotel and went up to the room where Mr. Wise and Mr. Stewart, I believe Mr. Gardner and Mr. Flanagan were there.

Q. Was Mr. Banfield there?

A. I don't recall.

Q. Do you know Mr. Banfield?

A. Yes, I do.

Q. Who is he?

A. I believe he is the comptroller or accountant for Sealtest.

Q. And will you tell us, Mr. Augenstein, what you said at this time, what Mr. Wise said at this time, what any other said at that time, and also what took place?

A. As I recall, Mr. Wise stated that he thought he had the answer to some of the difficulty in the market. He handed me two sheets of paper which were two wholesale milk price lists. He also handed me another sheet, as I recall, and it had a discount schedule on it. I asked him if I could have a copy, and he stated, no but if I wanted to make a pencil copy, I could, which I proceeded to do.

Q. And when so doing, did you make any observations about the documents you were examining?

A. He asked my opinion, and I made the statement that I thought that the discount looked completely out of line because it was quickly apparent to me that a small customer

would get a maximum discount. I made one query and that was why it was apparent that one list had lower by-product prices, asked why they were lower, and he stated, I believe, to put them in line with the milk prices. That's about the substance of the conversation because I was copying these documents on a piece of paper in longhand and you can't converse very well and do that. I wasn't there over twenty, twenty-five minutes, I suppose.

Q. Did Mr. Wise say anything to you other than what you have just related while you were copying the documents?

A. Nothing else.

Q. The by-product prices that were in existence at that time, had they fluctuated with the milk?

A. Sometimes they did and sometimes they didn't.

Q. Would it be accurate to say that the price war had been primarily on milk and not on the by-products?

A. In that immediate period, that is correct.

Q. Mr. Augenstein, I show you a document marked in evidence as GX Exhibit. 181-A, and ask you to examine that particularly with reference to columns designated 1 and 2, and ask you to state to the best of your recollection, whether the prices there indicated for the products correspond to the prices you found on the documents handed to you by Mr. Wise in this meeting?

A. My recollection is item marked No. 1—there is only two items that I frankly think I remember, and that is the price of half gallon. And in No. 1, you have 25, but as I recall, it was 27. And item 2, 33, that is the figure that I recall.

Q. Now, could you be wrong about the figure 27?

A. I don't think so. My best recollection has always been it was 27.

Q. Well, I will state to you, Mr. Augenstein, that in your Grand Jury testimony, I think one of the latest occasions you were there, you did say 27.

MR. PURCELL: I move to strike that reference to the Grand Jury testimony, Your Honor, I don't understand the purpose of that at all.

MR. HERNACKI: Your Honor, that is a prelude, I am about to ask Your Honor for the opportunity of attempting to refresh the witness' recollection by reference to the transcript Page 1045.

THE COURT: On what page?

MR. HERNACKI: 1045, Your Honor, that would be the first volume, Volume 6.

THE COURT: Would you approach the Bench, please?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: Let me make inquiry, Mr. Hernacki. Mr. Hernacki, I don't think you laid a proper basis of refreshment to make reference to the Grand Jury testimony until you ask him what his initial testimony was—

MR. HERNACKI: I agree, Your Honor.

THE COURT:—on September 16, 1958. And then you may make inquiry as to whether or not he testified in any different fashion, and you can make inquiry as to what happened in intervening time. But I don't think he has, up to this point, testified at all as to what his initial testimony was, and I do not think it proper to invade the secrecy of the Grand Jury Minutes until he has indicated that he does not remember what his testimony was. So I am not going to permit you at this time to utilize the Grand Jury Minutes until he does not recall what his testimony was. If he does not recall, then I will permit you to use it on both occasions, but I think you should give him the opportunity to testify independently of refreshment.

MR. JINKINSON: I think Your Honor is right.

THE COURT: Very well.

(WHEREUPON, THE FOLLOWING PROCEEDINGS

WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

Q. Mr. Augenstein, is it your recollection that the No. 1 price list, the lower price list, was at a price lower than the existing price on the market at that time?

A. It was lower than the existing price list, but as I recall, it was somewhere close to what some of the area pricing was.

Q. In other words, the spot pricing or area pricing?

A. That is correct.

Q. I ask you, Mr. Augenstein, if the list shown you contained the figure for the half gallon homogenized white milk of 25 or 23 cents?

A. My recollection is 27.

Q. Do you remember, Mr. Augenstein, what you testified to the very first time you appeared before the grand jury on the date of September 16, 1958, a few months after this event?

A. No, I do not.

Q. Could you have then stated 25 or 23 cents?

A. I wouldn't recall what I had stated at that time.

MR. HERNACKI: At this time, Your Honor, the Government renews its request to have an opportunity to refresh the witness' recollection.

THE COURT: Yes. Now, let me make certain which—you may refresh the witness' recollection as to his testimony on September 16, as it appears in the center of the page on Page 1045.

MR. HERNACKI: Very well, Your Honor.

Q. We will follow the same procedure, sir.

"QUESTION: (By Mr. Mann)"—and this is in relation to the meeting of June 20, 1958, at Mr. Wise's room at the Hotel President—"There were two price lists, as I understand it. You say the price at that time, the going price on the market, was 27 cents a half gallon?

"ANSWER: I believe that was right.

"QUESTION: One price list they showed you would be lower?

"ANSWER: That is right.

"QUESTION: The price would have been 25 or 23 cents a half gallon; do you remember what it was?

"ANSWER: 24 or 25. I am not sure which it was.

"QUESTION: And the other one was the price increase from the 27 up to 33 cents?

"ANSWER: Yes."

Were you asked those questions and did you give those answers, sir?

A. Yes.

Q. Does that refresh your recollection as to the price on the lower of the two price lists at that time?

A. I think I answered, because I believe our list price at that time was 33 cents. I believe my statement there was that our price was 27; I think we were 33. Our records will bear that out. So that at that time I believe area pricing was anywhere from 23 to 27, or 25 to 27.

Q. And what is now your best present recollection as to the price on the lower of the two lists shown you?

A. I still have to stand on the 27, because that is my best recollection.

Q. Would you again re-examine GX-181-A, Mr. Augenstein, and state whether or not the present prices shown in the first column reflect accurately the prices then in existence as of June 20?

A. The only one that I could pick out quickly, to be sure of, is half gallons at 33, and I believe at that time that was our price, our list price.

Q. And the prices in the No. 1 column for the by-products are substantially lower than those under the present column?

A. Yes, they are.

(R. 1081-1083)

Q. Before proceeding further with that, let me again

revert to the June 20 meeting, after you had copied the price lists. What, if anything, did Mr. Wise or any of the other Sealtest people say with regard to those price lists and discount schedules?

A. The only other remark that I remember, they stated that Mr. Callender was going to be there.

Q. And would be shown the same documents?

A. I assume so.

Q. Do you recall anything else, any other conversation between you and the Sealtest people at that meeting?

A. No, I do not.

Q. Did any one of the Sealtest people there tell you they thought this is what ought to be done to straighten the market up?

A. Not in that manner. I think I mentioned when I got into this meeting originally, Mr. Wise had stated that he thought he had—they might have the answer to some of the difficulty in the market. Outside of that, there was no other reference to that.

Q. Well, did they go a little further and say that is what ought to be done to straighten the market up?

• • •

A. No, he said nothing along that line.

MR. HERNACKI: At this time, Your Honor, the Government requests the opportunity to refresh the witness' recollection by reading from Pages 1045 and 1046 of the transcript.

THE COURT: You may do so. That is beginning at the bottom of Page 1045, Mr. Hernacki?

MR. HERNACKI: I believe I am in error, Your Honor, just the top of 1046, the question and the answer, or if you prefer, from the bottom of 1045.

THE COURT: Yes.

Q. Mr. Augenstein, I will read the portion to you:

"QUESTION: Did they explain why they were showing you two price lists; what was the object of showing you two price lists; did they explain that to you?

"ANSWER: Not in detail. I believe that they said that they thought that that is what ought to be done to straighten the market up."

Now, were you asked that question and did you give that answer, sir?

A. If I stated that at that time, that is exactly as I recall it.

Q. And would you say that is what they did say to you at that meeting?

A. Yes.

(R. 1095-1100)

Q. Mr. Augenstein, at any time in about July of 1958, did you have a conversation with Mr. Adams about two-for-ones?

A. Yes, I think I did.

Q. And will you state when and where that conversation took place?

A. I believe in his office.

Q. You went to see him?

A. Yes, sir.

* * *

Q. And can you place it any time within that month?

A. I can't recall the date, but I do recall being in Mr. Adams' office.

Q. Would it have been after the drop in prices on July 14th and also the by-product drop on July 21st?

A. I do not recall.

Q. All right. Will you state who, if anyone else was present besides Mr. Adams?

A. I think Howard Adams was the only one present besides myself.

Q. Can you tell us, now, what the conversation was between yourself and Mr. Adams on this occasion?

A. I believe we discussed, if I remember correctly, the engineers' contract, operating engineers' union contract, and I believe I made the remark to him that I had heard

that in the market, if there was any more two-for-ones, that it might go for the entire market. As I recall, he said Sealtest. This, I never said, I am sure.

Q. I am sorry, you lost me there on that last part.

A. Well, I think he referred to Sealtest being the one that was going to do this.

Q. You say he referred to Sealtest?

A. I am sure that's correct.

Q. And what did you say?

A. I did not know who it was going to be. This was only a rumor.

Q. A rumor?

A. That's right.

Q. You don't remember who told you that?

A. No.

Q. Don't you remember, Mr. Augenstein, that you heard that from Mr. Stewart?

A. I don't recall.

Q. Do you recall at any time that Mr. Stewart, just prior to this conversation with Mr. Adams, at any time in that general period prior to that conversation, Mr. Stewart telling you that he was going to drop the price all over the city at one time if they were going to have any more two-for-ones?

A. I am sorry, but I can't recall that conversation.

Q. In other words, a reference by Mr. Stewart that there is any two-for-ones for store openings, that was the Adams habit, is that not correct?

A. That is correct.

Q. If there are any more two-for-ones on store openings there would be a city-wide two-for-one, do you recall any statement to that effect in any language by Mr. Stewart?

A. Not that I recall.

MR. HERNACKI: At this time, Your Honor, I renew my request to read that particular material.

THE COURT: You may begin at the third question

from the bottom of Page 1096, and continue down to the question, the third from the bottom on 1098, which commenced, "In other words, you."

MR. PURCELL: Before that is done, Your Honor, and for the record, defendants and each of them object to the testimony concerning the matter under inquiry and to the refreshment of the witness' recollection concerning same, for the reason that the matter now being inquired about is not particularized or alleged in the indictment. We believe it is immaterial to any issue in the case, has no probative value.

THE COURT: Objection overruled. You may proceed.

MR. HERNACKI: Thank you, Your Honor.

Q. Again, the same procedure, Mr. Augenstein.

"QUESTION: Who was there other than you"—this is a reference to the discussion between yourself and Mr. Adams in his office.

"ANSWER: Howard Adams.

"QUESTION: Just the two of you?

"ANSWER: That is right.

"QUESTION: Didn't you tell him that you had been talking to Sealtest about the pricing situation in Kansas City?

"ANSWER: No, I told him that I had heard that if there was any more two-for-ones that the entire market was probably going to have a two-for-one at that same time and I told him that my only interest in it was that if that situation existed, I would become involved in it and it was not my liking at all.

"QUESTION: You said you had heard that. Now, where did you hear that, from whom?

"ANSWER: I don't know whether it was Mr.— I believe it was Mr. David Stewart who made that remark.

"QUESTION: Did he say that he was going to drop the price all over the city at one time instead of having spot areas?

"ANSWER: The remark, as I recall, was that if any

store, the opening of a new store, had a two-for-one, there would be a two-for-one sale in every store in the city at the same period of time."

Were you asked those questions and did you give those answers, sir?

A. That is correct.

Q. Do you recall Mr. Stewart making the remark about the two-for-one city-wide?

A. Apparently my recollection at that time was in that manner.

FRANK GARDNER

Sealtest—Assistant to Raymond Wise

(R. 1220-1223)

MR. HERNACKI: The Government calls Frank Gardner.

THE COURT: Counsel, approach the bench while Mr. Gardner is coming, please.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: In accordance with our practice on the Grand Jury notes, the Government has handed me a memoranda of some nine points. In regard to point No. 3, may I suggest to the Government that there are two subjects intertwined in that question, and unless both are covered at the same time, I think you should break the testimony apart.

In regard to point 7, and because of testimony that appears on Page 1693, I do not think that the testimony designated for refreshment is sufficiently precise, or at least there is a possibility of that. Let me give you a recap on point 7 depending on the way the testimony develops.

In regard to point 8, I will not permit refreshment on point 8, because it is apparent from other portions of the Grand Jury testimony that this witness was not present and he obviously was talking about what someone else has

told him. So I will not permit refreshment on point 8.

Other than those points that I have mentioned, the Government may be permitted to refresh the recollection as I have indicated.

MR. CHADWELL: Your Honor, I assume that we have the same motion that we have before?

THE COURT: Yes, you have both the objection and the motion standing throughout this record as to the utilization of the Grand Jury testimony.

MR. CHADWELL: As particularly it is difficult for us to follow these efforts to refresh the witness' recollection when we are unable to see what he did testify to before the Grand Jury. I know Your Honor is watching the actual reading of the parts that you permit Government counsel to inquire about, but—

THE COURT: In addition to that, I am reviewing the entire subject matter under examination to go with the particular portions that the Government seeks to use, and I am ruling prior to the examination of the witness or at least the utilization of the Grand Jury record exactly what has been stated there and exercising a juridical judgment as to whether or not there is data present from which it may be reasonably said that recollection can be refreshed or whether, in my judgment, such evidence is not present and as in connection with this particular witness.

I have ruled that it is my judgment that in connection with a particular point, I do not agree with the judgment of the Government that particular Grand Jury testimony would be calculated to refresh the witness' recollection on that particular point.

MR. CHADWELL: I understand, Your Honor, but at the same time, I am sure you understand our position, that for us to make our own evaluation to better prepare for cross-examination, it is difficult. In fact, impossible to do so without access to those portions of the transcript to which Your Honor has referred.

THE COURT: I understand that and the record so shows.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

(R. 1232)

Q. On June 13, 1958, Mr. Gardner, did you attend a meeting here in Kansas City at Mr. Wise's room at the President Hotel where other dairies' representatives were present?

A. I attended a meeting, yes, but I don't know about the date.

(R. 1234-1240)

Q. Who was responsible for that meeting?

A. I believe it was called at Mr. Pentz's request.

• • •

Q. Incidentally, was Mr. Banfield present at this meeting?

A. I don't recall that he was.

Q. Now, will you state to the jury, Mr. Gardner, what happened during this meeting, what was said and by whom, as best you recall?

A. Well, I believe it was just sort of a rehash of the problems that existed due to spot pricing, coupons, gallon jugs, weekend specials, the disrupted milk market. I believe this is the meeting when Mr. Edquist also thought—no, I believe that it was Mr. Augenstein, that the jugs was only two or three percent of the volume and didn't amount to anything. Mr. Stewart thought it was somewhere around eight to ten percent of the market, because we were steadily losing business, and I believe it was at this meeting that someone brought up that the Milgram chain was getting a long discount—I believe it was Mr. Edquist, brought up that the Milgram Company was getting a long discount

from the Borden Company and Mr. Pentz said, "Well, if we get two or three customers that give a special discount, too, that is the dairy business." And Mr. Edquist said, "Well, you can never have a stable market under those conditions." And I believe that Mr. Wise agreed with him. I know this, we were losing business steadily, our volume was going down badly. Spot prices were breaking out like the small pox and we were very much concerned about our business and we—well, we were just concerned about the business, that is all.

Q. Was that the entire meeting?

A. As far as I can recall now, yes, sir.

Q. The discussion about the Milgram Company, did Mr. Pentz say that that was a matter between Borden, Sealtest and because the two of you had that business alone, you would get that price up between you?

A. Well, no. As I recall, we were both serving them and Mr. Edquist said because of the—apparently because of the long discounts, the Milgram Company could put on a week-end special and disrupt the retail business, especially. And Mr. Pentz said, "Well, that's Sealtest and ourselves serving it, so if we want to give them a long discount, that is our business," or words to that effect.

Q. Did he also state that if we wanted to cut it out, we could do it, too; words to that effect?

A. No.

Q. Was a discount schedule, a proposal, shown by Mr. Augenstein?

A. Not that I recall, no, sir.

Q. What do you recall about any discount schedule?

MR. CHADWELL: You mean at that meeting?

• • •

Q. So we are clear, Mr. Gardner, all my questions are confined to this meeting at this time and what was said at the meeting.

A. At the June 13th meeting?

Q. Yes, sir.

A. There was no discount schedule, to my recollection, at all.

Q. Or a proposed rebate schedule?

A. No.

Q. Do you refer to a rebate schedule or discount by any other term?

A. No.

Q. Do you know what I am talking about?

A. Yes.

Q. Was one discussed at this meeting?

A. I don't recall it being discussed at that meeting, no.

Q. Did Mr. Stewart get ahold of a copy of a proposal from Borden which was talked about at this meeting?

A. I don't recall it, no, sir.

MR. HERNACKI: At this point, Your Honor, the Government desires to attempt to refresh the recollection of the witness by reading from Page 1678 of the Grand Jury transcript.

THE COURT: You may do so, commencing with the first question on that page, including the last answer.

Q. Mr. Gardner, you appeared before the Federal Grand Jury here in Kansas City on or about October 21st, 1958, do you recall that, sir?

A. I recall appearing, yes, sir.

Q. About four months or five months or so, right after the July meeting—or June meeting, rather?

A. Yes, sir.

MR. CHADWELL: May I inquire whether this was the first or second appearance of Mr. Gardner before the Grand Jury?

MR. HERNACKI: The second appearance.

MR. CHADWELL: Thank you.

Q. At this time, Mr. Gardner, I will read a portion of the testimony then given and I will ask you some questions about it, so would you just listen, please?

"QUESTION: Will you relate for us as best you can, and reconstruct it as best you can, the meeting, what was

said by the various persons who were there"—meaning this meeting in June.

"ANSWER: That meeting was called by—at the request of Mr. Pentz. Mr. Pentz had been after Mr. Wise to have a meeting. Mr. Wise did not want to have a meeting, but said the next time he was in Kansas City, he would let the local people know."

MR. HERNACKI: I am sorry, Your Honor, did I begin at the right point? I wasn't sure.

THE COURT: No, you can go clear down to the last answer on that whole page.

Q. "QUESTION: How did you find that out?

"ANSWER: Just from general conversation.

"QUESTION: Did Mr. Wise tell you that?

"ANSWER: Yes, I think he did, yes, sir. And at that—prior to that time, Mr. Stewart had gotten a copy of the proposed rebate schedule that Borden had been considering, and there was a general discussion on that, and at that time, I believe, Mr. Augenstein, said that that would not apply to the customer who we served mutually, which is the Milgram Company, that they would continue on the same basis. And Mr. Augenstein said, 'Well, if you are going to have special deals for special customers'—not Mr. Augenstein, Mr. Edquist, said, 'If you are going to have special deals for special customers, the whole thing will fall flat.'" Were you asked those questions and did you give those answers, sir?

A. Well, sir, if that—

MR. CHADWELL: Your Honor, I sumbit that a large part of that is quite the same as he said this time and I don't quite see the purpose of refreshing the witness' recollection. The only difference I see—

THE COURT: I think that is true, Mr. Chadwell. I wanted the witness to have the benefit—you are quite right, there is much of it that is consistent, and I will explain to the witness that the purpose of reading these questions and these answers is to aid you in refreshing your present recol-

lection concerning what happened at the June 13th, 1958, meeting. Counsel is about to ask you and I will ask you, do you recall those questions having been asked you and your giving these answers?

THE WITNESS: Well, sir, that was my testimony at the Grand Jury hearing. I am sure my memory was better then than it is now, five years later.

THE COURT: Well, let me ask you if having had these questions read you in context, and as Mr. Chadwell points out, confirming some of your earlier testimony, does this aid your present recollection as to what was said there so that you can better answer the question—

THE WITNESS: I think, sir, that I have answered it the same as my testimony there, except with reference to the Borden refund schedule or whatever it was that Mr. Stewart had.

THE COURT: Now, having heard the questions and answers concerning the Borden refund, does—or rebate, does this refresh your recollection at the present time?

THE WITNESS: No, sir, I really can't say that I can remember it, but it must have happened, because that was my testimony, and I did the very best I could there, as I am right now.

THE COURT: Very well.

(R. 1242-1245)

Q. Now, with everybody feeling that prices should go up, what did Mr. Wise say about going up at that time?

A. I don't recall any remark he made, sir.

Q. Well, he said something on the subject, did he not?

A. He may have, yes, although I don't recall it.

Q. It wasn't just a case of Mr. Edquist and Pentz and Callender saying that they thought this should be done and he not saying a word about it?

A. Well, I am sure that he agreed with them, and it should be done on some sort of a practical manner, because the market was a very—

Q. And what was the practical manner—excuse me.

A. —the market was in a very unstable condition. Lots of our customers were off list pricing. There was spot pricing, weekend specials, coupons all over the market by the major dairy and gallon jugs.

Q. And what was the practical basis on which Mr. Wise would like to handle the matter?

A. I can't speak for Mr. Wise, but—

Q. Well, I am asking you what he said at the meeting.

A. As I recall, he said that we were going to make a definite study of our condition and find out just what the prices were that we were getting for our milk.

Q. What else was he going to do?

A. I don't know.

Q. Did he say anything about some prices?

A. That were in effect or what?

Q. In any way; what did he say about prices?

A. I don't recall him saying anything definitely about prices, any more than everyone was suffering and just a general crying-towel session.

Q. What was Mr. Wise's purpose in making a study of the prices which Sealtest was then getting on the market?

A. I would say it was because their prices varied so much. We had prices, as I recall, as low as 23, 24¢ a half gallon—

Q. Yes, sir,—

A. —to meet certain conditions in certain areas. And from there on up to whatever the list price was at that time.

Q. So after those studies were made and it was determined exactly what you are getting for the product in the spot areas, what about it, what was going to happen then?

A. Well, I presume that we would arrive, for our own customers, a price list of our own and put it out, which it probably raised some customers prices and lowered others, I don't know.

Q. You mean put it down, didn't you?

A. Beg pardon?

Q. You mean put it down?

A. No, put the price list out to our customers and start out on a certain date.

Q. But the price lists were higher than the spot prices you were getting?

A. What price list?

Q. The list prices were higher than the spot prices in the market?

A. Oh, yes.

Q. And you were making a study of the spot prices to determine what price you should have on a new price list?

A. That's right, sir.

Q. So it would be a lowering of the list prices, wouldn't it?

A. Well; it would probably be someplace—it would be an average, I would say, of about what we were getting and I think maybe a little higher.

(R. 1248-1252)

Q. Mr. Gardner, we were discussing the study which Mr. Wise said he was going to have made. Do you recall him saying that he was going to come up with a price list which would reflect the average price of milk which you were then getting?

A. No, sir, I don't recall him saying that.

Q. And did he say he would come up with another list, a higher list, reflecting the prices that would be where you were earlier in the year?

A. No, sir, I do not remember him saying anything like that.

MR. HERNACKI: At this time, Your Honor, the Government would desire to attempt to refresh the witness' recollection by reading from Pages 1682 and 83 of his testimony before the grand jury.

Or perhaps may I suggest the first question at the bottom of Page 1681 as a better starting point?

THE COURT: Yes, I don't think we need that part on

1681, Mr. Hernacki. Start with the question as it appears on 1682.

MR. HERNACKI: Yes, Your Honor.

THE COURT: The first question on that page after the preceding long answer.

MR. HERNACKI: Very well, Your Honor.

Q. Again we will follow the same practice, Mr. Gardner. I will read and then ask you some questions. This again is from the testimony given on October 21, 1958, sir:

"QUESTION: Is this the June 11 meeting where he stated that you were going to consider making up a price list which would lower the prices on the market to more or less the spot level, the spot price level, and—

"ANSWER: (Interrupting.) It may have been that meeting, it probably was.

"QUESTION: And also another price list which would go into effect later on with higher prices in them?

"ANSWER: Well, another price list to see where we had to go in order to be where we were earlier in the year."

I think I had best continue with that, Your Honor.

THE COURT: I think so, so the witness can get it fully.

Q. (Reading:) "QUESTION: To bring the market up to a more normal level?

"ANSWER: Yes.

"QUESTION: So wasn't it his proposal that this market be put in a firm or a stable condition by a two-step process, first you lower your prices in the market in order to get down to the bottom, get down to that low level of spot prices, and then, if the market would steady at that low price for a certain period of time, then you would have more or less of a foundation, which would be sound and you could take your second step up to a price which had been prevalent—

"ANSWER: (Interrupting.) I don't think he stated it just such as that. He said the local people were going to make a survey, a projection, and a study on what our average pricing was then and what—a projection on a

price, and I think it was 37 cents the same price that prevailed some time in the past.

"QUESTION: That is the June 11 meeting, is that the way the meeting ended, with him saying he would make that study, his company would have that study made?

"ANSWER: Oh, I don't know whether it ended right at that particular time or not, no.

"QUESTION: At least he made that statement—

"ANSWER: (Interrupting) The statement was made to that effect, and I presume he is the one that made it."

Were you asked those questions, sir, and did you give those answers at that time?

A. Well, if that is what the transcript says, I must have.

Q. Does it refresh your recollection with respect to whether or not Mr. Wise said that he or the Sealtest people here would come up with a price list reflecting the more or less area prices and also a second price list at a higher level?

MR. CHADWELL: I object, Your Honor, that is not what the transcript indicates.

THE COURT: Sustain the objection as to the form. I think the word, "study," was used, Mr. Hernacki.

Let me ask you, after having heard the questions and answers read you, Mr. Gardner, what is your recollection in regard to the conversation that took place at the June 13, I think it has been established as the date, rather than June 1, 1958, meeting?

THE WITNESS: Well, Your Honor, as I said a while ago, I remember, I am positive we said that the local people would make a study, a survey of what prices we were getting from our customers at that time, and we would make some projections, based on the results of that survey.

THE COURT: Go ahead.

THE WITNESS: And try to create a stable market.

THE COURT: You may inquire further, counsel.

Q. And how was that market to be made stable?

A. Well, so we wouldn't have these wide variations, so

all our customers would be buying somewhere near the same price.

(R. 1273-1278)

Q. On July 14, Mr. Gardner, were you present at another meeting between Mr. Wise and representatives of other dairy companies?

A. Where was this?

Q. In Chicago, Illinois, Mr. Wise's office, sir.

A. Was that Mr. Pentz and Mr. Edquist?

Q. Yes, sir.

A. I was there part of the time, yes.

Q. And just the four of you?

A. I believe so.

Q. When you walked into the room on that day, what was going on?

A. Well, Mr.—was that the day when—

Q. There was a price—

A. —when Foremost dropped the price?

Q. Correct, sir.

A. Fairmont or somebody dropped the price.

Q. Yes.

A. Yes, Fairmont. We didn't know anything about it until Mr. Stewart called that morning, and Mr. Edquist apparently didn't know anything about it. Mr. Pentz didn't know anything about it.

Q. When you walked into the room, Mr. Gardner, what was going on?

A. Gosh, I don't recall definitely what was going on, sir.

Q. What was the conversation that took place that you did hear?

A. I do remember Mr. Edquist saying, words to the effect that if Fairmont dropped the prices, it was because they were losing so much retail business that they were trying to protect their home service, volume.

Q. Who was he saying that to?

A. Probably to Mr. Wise and Mr. Pentz.

Q. Did you, Mr. Gardner, say anything at that meeting?

A. I probably did, but I don't recall what I said.

Q. What did Mr. Wise say?

A. I believe there was further discussion about the various methods of meeting the gallon jug competition.

Q. I repeat, what did Mr. Wise say?

A. That he still believe we should meet it with conventional containers.

Q. At what price?

A. At a price where we would not continue to lose volume.

Q. What price?

A. I don't know what the price, but there is area over and above the jug price, where we felt we couldn't continue to lose volume.

Q. Certain spread?

A. Yes, maybe three or four cents a gallon, something like that.

Q. Could it have been five cents?

A. Well, you get it too high and you continue to lose volume especially when these housewives know that all milk is good milk.

Q. Well, who, Mr. Gardner, was the first one to say that the price was down in Kansas City?

A. I think I got the message from Mr. Stewart.

Q. Yes, sir.

A. And I think I am the one who told the rest of them.

Q. You are the one who told the rest of them?

A. I believe so.

Q. This was news to all of them?

A. It apparently was. Apparently Mr. Edquist didn't even know it.

Q. And you are the one who told them?

A. Yes, sir—I believe so.

Q. Could it have been, Mr. Gardner, that it was Mr.

Edquist who was telling the others when you walked into the room on that day?

A. No. I am sure I got a call from Mr. Stewart that morning.

Q. Regardless of whether you got the call from Mr. Stewart, could it have been when you walked in the room the first time that day Mr. Edquist was telling the others about the drop in price by Fairmont in Kansas City and the reasons for it?

A. No, sir, I don't recall that, no. I believe I am the one who got the news.

MR. HERNACKI: At this time, Your Honor, the Government desires the opportunity of attempting to refresh the recollection of this witness by reading from Page 1699 of the transcript starting with the bottom first paragraph.

THE COURT: Did you propose to read any more than that portion—

MR. HERNACKI: I think just the first complete answer on Page 1700.

THE COURT: That will be permitted.

Q. Well, following the same procedure, Mr. Gardner, reading from your testimony, that is, October 21, 1958, you are giving as part of an answer where you are changing from one subject to another:

"ANSWER: In the interim period there, oh, when we were in Chicago—it was the day that Fairmont dropped the prices—and when Mr. Oliver came in—not Mr. Oliver, Mr. Pentz came in, I wasn't in Mr. Wise's office when he first came in there, but when he came in and found out the prices had dropped, it was the first time he had known that they had dropped about five or six cents a half gallon that day by the Fairmont people, which is Country Club, I think, and Mr. Pentz's explanation of it was that they were losing so much retail business, due to these low cost spot pricings and—

"QUESTION: (Interrupting.) Pentz? Pentz is with Borden.

"ANSWER: Not Pentz, Edquist. Because of the low spot pricing, off list pricing, low-cost gallon jugs and coupons and so on, that they decided they had to do something to protect their retail business, so they put a lower price into effect, both retail and wholesale.

Now, were you asked those questions and did you give those answers, sir?

MR. CHADWELL: If Your Honor please, I protest that this is not proper refreshment. I don't think there is anything in there that is inconsistent with the witness' testimony at all.

THE COURT: Objection overruled. You may answer as to whether that refreshes your recollection—

MR. CHADWELL: I object to the question, Your Honor.

THE COURT: —as to who found out, by what means, Mr. Pentz found out.

A. No—if that is what I testified to before the grand jury, my memory was much closer to the events because it was closer to the events at that time, and if that is what I testified to at the grand jury, I am sure that is what happened because I testified to the best of my ability and recollection.

Q. Is it possible then that when you walked in, Mr. Edquist was telling the people about the drop?

A. Very possible.

JOHN W. BAIRD
Sealtest Milk Sales Manager

(R. 5392-5393)

CROSS-EXAMINATION

BY MR. JINKINSON:

• • •

Q. Now, Mr. Baird, you appeared before a Grand Jury,

didn't you, investigating the milk conditions in Kansas City, Missouri?

A. Yes, sir.

Q. And I hand you Defendants' Exhibit 142-X and Y.

• • •

Q. (By Mr. Jinkinson) You testified before the Grand Jury prior to the time you wrote those documents, did you not?

A. I am not real certain when I did appear before the Grand Jury. I was subpoenaed twice and only appeared once, and the exact date, I couldn't tell you.

Q. You can't tell whether or not you appeared prior to —before the Grand Jury prior to the time you wrote Defendants' Exhibit 142-X and 142-Y?

A. I couldn't answer that as to whether I had or had not, sir.

MR. CHADWELL: Mr. Jinkinson, if you will tell me the date when he appeared before the Grand Jury, I will be very glad to stipulate to it.

MR. JINKINSON: I think it was September, 1958.

MR. CHADWELL: Well, as soon as you are sure about it, we will check the date and we will have no problem as to the stipulation as to when Mr. Baird appeared before the Grand Jury, if he doesn't remember.

(R. 5518-5521)

Q. Now, have you always been of the opinion that these jug operations in the Kansas City area were detrimental to your business?

A. Yes, sir, we kept losing retail business to them.

Q. And you were firmly convinced of that in December of 1958?

MR. CHADWELL: Objection, immaterial as to December, 1958. This map goes up to June and December is beyond the indictment period and it is outside the scope of the direct examination. If he wants to inquire about June, 1958—

Q. (By Mr. Jinkinson) Were you firmly convinced in

July of 1948 that these jug operators were detrimental to your busines?

A. Yes, sir.

Q. Mr. Baird, do you recall testifying before a Grand Jury in this matter?

A. I appeared before the Grand Jury, yes, sir.

Q. Do you recall testifying on or about the 4th day of December, 1958?

A. I don't remember the exact date.

* * *

Q. Yes. Well, do you recall that you were asked this question and you gave this answer—

MR. CHADWELL: Well, now, I object to that. First, I think we should have it clear in the record, of course, so it would show when Mr. Baird appeared before the Grand Jury and I would like to have Mr. Jinkinson state that.

MR. JINKINSON: He appeared on December 4th, 1958.

* * *

THE COURT: The record will also show that the same procedure was followed in connection with this witness and your same objection will show of record and that the Court has reviewed his testimony prior to examination.

Q. (By Mr. Jinkinson) Do you recall being asked this question and having given this answer

MR. CHADWELL: May it please the Court, may we approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. CHADWELL: May I inquire of the Court whether Mr. Jinkinson has shown to the Court the transcript of the Grand Jury testimony?

THE COURT: Yes. Yes, the same memoranda has been submitted to the Court in connection with testimony given by Witness Baird on December 4th and December 5th with

the sections marked for the testimony covers the entire subject and the particular questions that Mr. Jinkinson wishes to inquire about, which appear on Page 1930. The witness' prior testimony as to his attitude toward the gallon jug situation in July, '58, is directly within the scope of the examination that has been shown to the Court, and the Grand Jury testimony relating to that question, I take it, Mr. Jinkinson, is what you wish to refresh his recollection?

MR. JINKINSON: Refresh his memory on, that is all. If it doesn't, that is the end of it.

MR. CHADWELL: Well, I wish to make the same motion that I have heretofore, Your Honor, the same objection that I have heretofore; namely, that I think we should be permitted the opportunity of seeing these sections of the transcript which Mr. Jinkinson is going to inquire about and also those relating to it so that we can decide whether we should redirect the witness on these questions.

THE COURT: That's right, and I intend for the record to so show on the statement I made before we were here, but I guess this has been spelled out completely at this conference and the same ruling will be made.

(R. 5523-5524)

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

Q. (By Mr. Jinkinson) Well, Mr. Baird, do you recall having been asked this question and having given this answer: "Question, what did you tell Mr. Flanagan or what was your conversation with him with regard to the gallon jug operators? Answer: I think the gallon jug operators were just a small factor right at that time, as I—I mean I am trying to remember?"

A. At what time was this being discussed? I don't recall that answer, no, sir, in answer to your question, trying to place this.

Q. Does that refresh your memory?

A. No, sir, I don't recall that question at all.

Q. Is it a fact, Mr. Baird—

MR. CHADWELL: Does that conclude your reading?

MR. JINKINSON: That concludes it.

MR. CHADWELL: Well, if Your Honor please, I don't think that is in any way contradictory to this witness' testimony, and I move to strike the question and answer.

THE COURT: Well, the witness has testified that this does not refresh his recollection as to the conversation and his description of his view of the jug operators on Jul 1958.

MR. CHADWELL: I don't see how it could. He talks about "at that time." There is no showing what it is about and I object to it. Move to strike it.

THE COURT: You say you move to strike it?

MR. CHADWELL: Yes.

THE COURT: The motion will be overruled.

(R. 5590-5591)

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. CHADWELL: I don't want to press unduly the motion I made this morning with respect to Mr. Baird's Grand Jury transcript, but after the reading of the question and answer by Mr. Jinkinson and the response by the witness, I renew my motion for leave to read the remainder of the testimony of the witness on this subject only. I am limiting it to this subject, because I have no desire to press into the general testimony of this witness except insofar as his other testimony relates to the subject matter of the question and answer read to him by Mr. Jinkinson. I renew the motion before this witness leaves the stand so that if I deem it desirable, I will have the opportunity to—or Mr. McLaren, in directing the witness, will have the opportunity to ask him some further questions on the subject.

MR. JINKINSON: I, of course, just used it to refresh the witness' memory. He said it didn't refresh it, that was the end of it.

MR. CHADWELL: Well, the jury, of course, heard the question and answer and they draw certain adverse conclusions, perhaps, which they aren't warranted in drawing on the basis of refreshment of recollection, but which nevertheless is a dangerous probability and that is the reason I make my motion.

THE COURT: I will overrule the motion, because I think basically the same situation is presented here as presented throughout.

DAVID W. STEWART
Sealtest General Manager

(CROSS-EXAMINATION)

(R. 6347)

Q. (By Mr. Hernacki) Now, with regard to June of 1958, there was a meeting held in Kansas City on June 13, 1958, at the President Hotel, and you have testified about that earlier?

A. June what?

Q. 13th.

A. Yes.

(R. 6353-6358)

Q. Prior to the time of this meeting, hadn't you received from Mr. Augenstein a new proposed discount schedule or a draft of one?

A. I can't be sure. I don't think so, but I am not sure. I don't believe that I saw—I know I didn't see the actual discount schedule that they put in on July 1. I am just reasonably sure I had never seen it before, because it was rather shocking. I know I testified at the Grand Jury that I thought I had seen one somewhere, but I don't believe I saw one prior to June 30 when they put that thing out. It just didn't fit.

Q. You say you testified before the Grand Jury that you had seen it before June 20?

A. If I remember right, I testified to something like that.

Q. And that testimony was given in 1958?

A. Yes.

Q. Well, is your memory a little different from the rest of us, Mr. Stewart, does it improve with age?

A. Well, certainly a lot of important things in my life, and things pertaining to the business, I think you remember a lot of things. I think it has been said many, many times that those things that aren't of interest, you can forget. You can certainly remember the things that are more of interest and important.

Q. Well, how is it that you could remember in 1958 that you had that discount schedule or a draft of a discount schedule before the meeting, and now you say you didn't have it until after that meeting?

A. If I testified to that in front of the Grand Jury, and I am not sure, and I said that, if I did—there is—I can't answer, I mean if you have the proof there, bring it out.

MR. HERNACKI: At this time, Your Honor, the Government requests the opportunity of attempting to refresh the witness' recollection by reading from Page 1596—

THE COURT: Yes. Do counsel want the same record made on this, and it is the same record?

MR. PURCELL: Your Honor, we didn't know there had been any markings until just now.

MR. CHADWELL: Any what?

MR. PURCELL: Any markings.

MR. CHADWELL: Nothing has been raised, and this witness testified a long time ago.

THE COURT: He has requested that his recollection be refreshed on what his Grand Jury testimony was.

Isn't that right, Mr. Stewart?

THE WITNESS: No, I don't believe I said that. If he has something to disprove what I said—

MR. CHADWELL: He said if he had something, bring it out.

THE COURT: I assume from that statement that he

wanted the matter checked. Do you want the matter checked?

THE WITNESS: No, I have testified as to what I remember, and I don't know that I testified at all in front of the Grand Jury that I had seen it prior to, but certainly in the bringing it up to date, and the effect that it had on me when I saw it, June 30, there is a question that I had ever seen it before. Now, that was what I had said.

MR. HERNACKI: The Government stands on its request, Your Honor.

THE COURT: Yes. You would like to refresh his recollection as to what he did testify so.

MR. CHADWELL: As to that part of it, Your Honor, I suggest, as I have before, this witness testified—Mr. Stewart testified, I think, on three different occasions before the Grand Jury. No doubt this subject was covered many times. I don't know. I wasn't there. But I suggest that if he did testify on this subject before the Grand Jury, we be permitted to see everything that he said, not just some excerpt that counsel chooses to bring out, and so move and request.

THE COURT: Mr. Hernacki, I will permit you to see whether or not the answers volunteered by this witness on Page 1576 and 1577—

MR. HERNACKI: Your Honor, I am sorry, I think I gave the wrong page. I think it is 1596.

THE COURT: Did I say 76?

MR. HERNACKI: Yes, sir.

THE COURT: I was actually looking at 76 in connection with another note. 1596 is your Point 2 on your memoranda.

MR. HERNACKI: Yes, Your Honor.

THE COURT: I would permit you to read the second question and answer.

MR. CHADWELL: Your Honor, we have moved the Court for permission to see that and also all references

to this subject matter, if there are any otherwise in this Grand Jury transcript.

THE COURT: Yes, and this is my consistent ruling throughout the case. The motion will be denied.

MR. HERNACKI: Before proceeding with that, Your Honor, may I inquire of the witness another question?

THE COURT: Yes, and I think there may be—

MR. HERNACKI: Perhaps this might be a good time for an adjournment, Your Honor—

THE COURT: I think it would, because actually I looked at your Point 2, and you said Point 2 is right, and I think it is under your Point 3, actually.

MR. HERNACKI: Maybe we better regroup.

(R. 6360-6374)

Q. Mr. Stewart, I am going to read to you a short passage from your Grand Jury testimony and then I will ask you something about it. I will read the question and answer, and this is in regard to the meeting we have been discussing on June 13th, 1958.

THE COURT: What page are you on?

MR. HERNACKI: This is Page 1596 of the transcript, Your Honor.

THE COURT: Thank you.

Q. (By Mr. Hernacki) You will recall the earlier testimony here, sir, to the effect that in the Grand Jury proceedings it was believed the meeting was on June 11th and you discovered later it was the 13th?

A. I don't remember that.

Q. Well, do you recall you were testifying in the Grand Jury about June 11th as a date, whereas actually we have evidence here it was the 13th?

A. Yes.

Q. "QUESTION: Had you attended a meeting with Mr. Augenstein on June 11th in Kansas? ANSWER: There was —I can't say whether it was June 11, but prior—I think

it was after I had received a copy of this ten percent discount from Mr. Augenstein that Ray and Frank were in town."

And again does that refresh your recollection as to what you said before the Grand Jury, sir?

A. No, it doesn't.

Q. Does it help you in any way to pinpoint when you first received a draft of some sort of a discount from Borden, from Mr. Augenstein?

A. No, it does not. I know if I had received it, I didn't keep it and we certainly didn't consider it seriously, because I made no projections on it or as to how it affected our customers, how it fit into our customers, because I did that on June the 30th when they came out with their price increase notice of July the 1st.

Q. Well, didn't you discuss the Borden proposal at the meeting at the President Hotel?

A. No.

MR. HERNACKI: In that connection, Your Honor, the Government desires to read a passage from Page 1597 of the transcript.

THE COURT: For the purpose of refreshment?

MR. HERNACKI: Yes, Your Honor.

Q. (By Mr. Hernacki) Again, sir, I will read a portion and ask you about it.

MR. CHADWELL: Your Honor, I assume that we have a standing motion for—in fairness for the right to examine this and all related passages before redirect of Mr. Stewart?

THE COURT: Mr. Chadwell, you have had that from the outset of the case.

MR. CHADWELL: Yes.

THE COURT: And I have indicated to you that my view of the law is that I can't do that.

MR. CHADWELL: I understand that, but I want to have the understanding that we have this standing objection not only to the previous question, but anything else he reads to the witness.

THE COURT: And at any other time that reading is made for the purpose of refreshment.

MR. CHADWELL: Thank you, Your Honor.

Q. (By Mr. Hernacki) "QUESTION: Well, what was the purpose of this meeting on June 11th"—June 13th, actually—"you attended it, what transpired? ANSWER: I think this ten percent discount was studied. Of course, there was—not studied, it was—we told them we did not like it and I think probably others told them they didn't like it, that is wasn't workable, and certainly a discussion of the gallon situation and the deplorable situation of the market, the spot subsidizing."

Does that to any degree, sir, help refresh your recollection on this point?

A. Not as to a discount plan at that meeting, no, sir.

Q. You don't recall any discussion of a Borden proposal at this meeting?

A. No, sir, I don't.

Q. You testified on direct that Mr. Edquist had complained about the long discounts, Milgram and Fleming, and stated in words to the effect that they should be eliminated?

A. I don't think he knew, I think he was just fishing a little bit—

Q. Sir, I am just asking whether you testified about that on direct?

A. Yes.

Q. And what did Mr. Pentz say about this?

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A. When Mr. Edquist said that he thought some of the spots, some of the weekend specials, some of the loss leaders, were created by long discounts and he pointed, I believe, mentioned Fleming and Milgram. And Mr. Pentz said, "Those two accounts are the concern of Sealtest and Borden's," and that ended the conversation. Well, it ended Mr. Pentz' conversation, Mr. Edquist—

Q. Well, before you are proceeding, may I inquire, did

Mr. Pentz further state that since they were controlled by the two companies, they could handle them at any time?

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A. I have stated what I think Mr. Edquist—or Mr. Pentz said, and Mr. Edquist then added that in any market where two large accounts were off list pricing—in other words, spot pricing, subsidized, or call it what you wish—it is bad for the market, and Mr. Wise agreed a hundred percent.

Q. Well, perhaps I can try to refresh you, sir, on Mr. Pentz.

MR. HERNACKI: At this time, Your Honor, I request the opportunity of seeking to refresh by reading from the transcript at Page 1769 and 1770.

MR. CHADWELL: May I inquire, Your Honor please, as to what he's said he is refreshing the witness on?

MR. HERNACKI: With regard to what Mr. Pentz said on this subject.

MR. CHADWELL: In response to Mr. Edquist's observation?

MR. HERNACKI: Correct.

THE WITNESS: This is my conversation?

MR. HERNACKI: Yes, sir. Do I have the Court's permission?

THE COURT: Yes, you may.

Q. (By Mr. Hernacki) "QUESTION: Who made that statement? ANSWER: Well, it was just conversation, I don't know who made it. I remember at that time that Jack Pentz—there were two large customers in this town in Kansas City, one of which was the Milgram Company, that the Borden Company and ourselves were serving, that it was necessary to go to thirteen percent because of the competitive offer by Hawthorn-Mellody, and the other one was the Fleming Company on the regular discount plus their central billing, that I think Jack Pentz of the Borden Company made the remark about, that certainly those two shouldn't keep the market upset because it was just between

the two companies, the Borden Company and ourselves and that should be able to be handled at any time."

And then the conversation goes on. Do you recall—does that refresh your memory as to what Mr. Pentz said on the subject?

MR. PURCELL: Now, just a moment, Your Honor, I may be wrong, but I think Mr. Hernacki's last question regarding what Mr. Pentz said had to do with the control of these two accounts by Borden and Sealtest. Furthermore, I suggest that it is perfectly improper to permit this reading from the Grand Jury minutes, because it isn't the slightest bit inconsistent with what the witness has testified.

THE COURT: I think perhaps, Mr. Hernacki, you should finish—

MR. HERNACKI: Yes, Your Honor.

THE COURT:—the rest of the answer of the witness, because it ties in and relates to the entire matter.

MR. HERNACKI: Continuing: "And that should be able to be handled at any time and Erhardt Edquist said, 'I don't think any market can be sound with any two major customers buying ice cream or buying milk for a lesser price than what the rest of the average market is buying it at,' and I remember specifically that Ray Wise said, 'I agree with that one hundred percent,' and I agreed with it a hundred percent and we have desperately tried to get these things straightened out and were not able to do it until some time in July when we cut out all spot subsidizing, which was fifty-eight percent of our wholesale business."

MR. CHADWELL: If Your Honor please, I think that the witness does not need refreshing, this is exactly consistent with what he has testified.

MR. JINKINSON: He has not testified to what Mr. Pentz said.

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MR. CHADWELL: I don't think it is fair refreshment, Your Honor please.

THE COURT: Gentlemen—you may ask the witness whether or not this refreshes his recollection as to what

Mr. Pentz said simultaneously Mr. Stewart, with your testimony about the hundred percent. Does this refresh your recollection as to what Mr. Pentz said at that time?

THE WITNESS: What about the hundred percent?

MR. CHADWELL: Your Honor, may I call the Court's attention to what the witness testified yesterday on this subject, Page 6185?

THE COURT: Well, Mr. Chadwell, the purpose of this examination at the present time is to determine whether or not the testimony of this witness before the Grand Jury refreshes his recollection as to what Mr. Pentz said, and in response to a question from Mr. Hernacki, the witness could not testify, and the whole purpose of this is for that purpose and none other.

MR. CHADWELL: I understand, Your Honor. I don't want to press the point if Your Honor doesn't want to hear me any further.

THE COURT: Let me finish this, because I think you will approve highly of what I want to tell the jury. I want to advise the jury that this portion of the Grand Jury testimony occupies the same position as any other portion of Grand Jury testimony that has been read for the refreshment of the witness' recollection. If it does help the witness' recollection, as in some instances during the trial that has proved to be the case, then the witness gives firm testimony. If it does not, that is the end of that. You are not to consider the portion of the Grand Jury examination as evidence in this case.

Now, do you have anything else to add?

MR. CHADWELL: I have this objection, if Your Honor please, and as I say, I don't want to press it unduly if Your Honor has ruled, and I, of course, don't object to the statement the Court has just made to the jury, but the fact is, in his testimony yesterday, he expressly testified as to what Mr. Pentz said—

MR. JINKINSON: Where?

MR. PURCELL: He has done so today.

MR. CHADWELL: At Page 6185.

THE COURT: Mr. Chadwell, this is on cross-examination.

MR. CHADWELL: I understand.

THE COURT: And I think the fact that he did testify, places it directly within the scope of the cross-examination—

MR. CHADWELL: No doubt about that.

THE COURT: —and this is what Mr. Hernacki is attempting to do.

MR. CHADWELL: Well, I don't object to his cross-examining on it, I just object to this way of doing it.

THE COURT: You may proceed, Mr. Hernacki.

Q. (By Mr. Hernacki) Did you answer as to whether or not that refreshed your memory as to what Mr. Pentz said at this time?

A. I have testified just here as to everything that I remember Mr. Pentz saying at that meeting.

Q. Mr. Edquist was opposed to the long discounts to Milgram, Mr. Pentz made the statement you have testified to, and Mr. Wise said he agreed with that one hundred per cent?

A. That isn't exactly the way it happened.

Q. Well, will you restate it the way it happened?

A. I told you that because of the weekends, because of spot pricing—

Q. You are talking about the conversation now?

A. Yes.

Q. All right. Who said what now?

A. This is Mr. Edquist. Because of those things he felt that there was a long discount, and he didn't know what the discount was, to who, or anything other than the regular established discount, but he said that he felt that was the reason for some of these weekends, and what do you call them—well, when you sell an item low.

Q. Low pricing?

A. No; it is—

MR. JINKINSON: Loss leader.

A. It is a special, and he felt that it was caused by a long discount to these two customers that he mentioned, and that it was bad for the market or any market where you had that situation, where any two customers or one customer was off list pricing, and created these weeeknds, or the loss specials, and—

Q. (By Mr. Hernacki) Would you carry on with the rest of the conversation on this subject?

A. Well, Mr. Pentz just said that, if I remember right, that that was Sealtest and Borden's customers and that ended that, but Mr. Edquist—

Q. Did he say that ended that?

A. No, he didn't say it. I said it, that ended his conversation. He said that was the concern of Sealtest and Borden or that was their customers and their problems.

Q. What did you understand him to mean by that statement?

A. Well, I would say we served together with Borden's, the Milgram stores, and we served most of the Fleming stores, and that is when Mr. Edquist said that any market, this market or any other market where one or more customers were on a long discount and they could use it to have these weekend specials, it was bad for the market, and Mr. Wise agreed a hundred per cent.

Q. And on August 1, 1958, you and Borden did get rid of that long discount to Milgram, didn't you?

A. We did. I don't know what Borden's did.

Q. You never learned that Borden discontinued long discounts to Milgram?

A. No, sir, nothing direct. We kept our business so we figured we certainly didn't have an advantage at a particular time. We didn't lose it until later.

Q. You didn't learn from any source that Borden had also put in the same type of discount schedule you had and had discontinued its long discount to Milgram?

A. Oh, when we put in our discount schedule of 7 and 3—

Q. On August 1, 1958?

A. I had no knowledge whatsoever that they didn't have something extra to the Milgram's store. In fact we lost, at that particular time, cut down to 10 per cent of the space and lost about 80 per cent of our volume so there was a question in my mind whether it was because we weren't subsidizing spots, we cut out all of the spots, or whether it might have been something a little extra. Certainly we lost our volume and there must have been a reason for it.

(R. 6413-6417)

Q. Now, on October 30—I am sorry, on June 30, 1958, you testified you had a phone conversation with Mr. Augenstein. Do you recall, that, sir?

A. After I had picked up some Borden—well, yes. After I had picked up some Borden price lists or I hadn't picked them up, they came up to our office through our drivers and our sales organization, I did call Mr. Augenstein to ask him—

Q. Now, just a second, was he calling you as a matter of courtesy?

A. No, I had no call from Mr. Augenstein. Maybe that is the reason we eventually lost most of the Milgram business.

MR. HERNACKI: At this time, Your Honor, Government desires to read from Page 1576 of the Grand Jury transcript in an effort to refresh—

THE COURT: On what particular point, Mr. Hernacki?

MR. HERNACKI: With regard to who made the call, who initiated the call.

THE COURT: I am not sure that the witness has testified definitely whether he has a recollection on that. I think you should make further inquiry as to whether he called Mr. Augenstein or Mr. Augenstein called him. I

am not clear from the testimony exactly what the witness' present testimony is.

Q. (By Mr. Hernacki) What is your testimony on that point, sir?

A. I believe I testified yesterday that I called Mr. Augenstein. I might add I found out, whether I called him or he called me.

Q. We will get into the conversation in a minute.

MR. HERNACKI: In view of that—

THE COURT: I didn't get this last.

THE WITNESS: I said I found out that the discount did not apply to the Milgram Stores, whether I called him or he called me. I know it was a telephone conversation that I found out about it.

Q. (By Mr. Hernacki) Now, is your testimony now that you are not sure of who called whom?

A. Well, you've put a little question in my mind. There was no question before, I don't believe.

Q. That is the first time I have been able to do that.

A. You have tried.

Q. Well, is it now your testimony that you are uncertain as to who initiated the call?

A. I will stick to my testimony of yesterday that I believe, to the best of my ability to remember, that I called Mr. Augenstein, but it could have been the reverse.

MR. HERNACKI: In view of that, Your Honor, I request the right to read from Page 1576 and 7.

THE COURT: You may do so for refreshment purposes.

The defense objection shall stand of record.

Q. (By Mr. Hernacki) (Reading:)

"Q. What was the conversation, what did you say, what did Mr. Wise say, what did Mr. Gardner say?

"A. I don't know whether I can pinpoint that or not. I do remember this, that I received a call from Art Augenstein and I think this was on the 30th—

"Q. (Interrupting) You didn't receive it before then?

"A. No, sir, it was telling us that the price increase—telling us that the discount schedule did not apply to all his customers. There was one customer that it did not apply to. That was the customer that was mutually served by both of us, and certainly that was another reason why we couldn't go along with the setup that they had or why we didn't agree with it, why it would be wrong. It was not only wrong for the small dealer but we didn't have time to devise something that would be right. The spot pricing was still over the area and the gallon jugs were still off price."

Does that, to any extent, sir, refresh you as to who initiated the call in the first instance?

A. I can't even tell from what you read who made the call, whether it was Mr. Augenstein or myself.

Q. Would it help if I read it again?

A. It might.

Q. The first part relating to the call?

A. Yes.

Q. (Reading:)

"Q. What did Mr. Wise say, what did Mr. Gardner say?

"A. I don't know whether I can pinpoint that or not. I do remember this, that I received a call from Art Augenstein and I think this was on the 30th—

"Q. (Interrupting) You didn't receive it before then?

"A. No, sir, it was telling us the price increase—telling us the discount schedule did not apply to all of his customers."

A. It could have been him or it could have been me. I testified there that I thought it was Mr. Augenstein that called me, and I testified yesterday that I thought it was I that had called Mr. Augenstein. Anyway, I found out that it did—that discount did not apply to the Milgram Stores.

APPENDIX D

EXCERPTS FROM THE TRIAL JUDGE'S CHARGE TO THE JURY

(R. 7118-7144)

In connection with my over-all Robinson-Patman charge, I will first state the applicable portion of the law as passed by the Congress. I will then outline the charges made against Defendant National and Defendant Wise as alleged in Count 13, then outline the charges made in Count 2 in which only National is named as a party defendant and which represents an example of all of the distributor counts.

The principle of law which I now give you in regard to Section 3 of the Robinson-Patman Act, of course, are equally applicable to the Kansas City count and the six distributor counts, although the evidence regarding each is different. But of paramount importance, you must keep in mind that Mr. Wise is not named as a party defendant in any count except Count 13.

As I make reference to allegations in the indictment, I again remind you that those allegations are merely charges and not evidence in the case. First, the law as passed by the Congress, the relevant portion of Section 3 I will repeat so that you have it fresh in mind, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to sell or contract to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

I now outline the charges in Count 13 and Count 2. The indictment as modified by the bill of particulars charges that beginning on July 14, 1958, and continuing thereafter until about August 27, 1958, National, its officers and directors, including Defendant Wise, while engaged in interstate commerce and in the course of said commerce, sold

milk in the greater Kansas City market at unreasonably low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act.

The indictment alleges that pursuant to the offense charged, National utilized the advantages it possessed by reason of the fact that it operated in a great many different geographical locations in order to finance and subsidize a price war against the small dairies selling milk in competition with it in the greater Kansas City market by intentionally selling milk to its customers at prices which were below its cost.

You will recall that earlier I mentioned that the question of economic power was an issue and it is in this connection that the exception that I mentioned when I charged you concerning the size of the Defendant National will be applicable.

Count 2 of the typical distributor count allegations charges that beginning about July 15, 1958, and continuing until about August 27, 1958—and the dates in the other distributor counts will, of course, be different and I will give you those as I reach them—that National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributor, in the case of Paola, Mr. Merle Martin—I will give you the other names as I reach them—in the Paola-Osawatomie market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged, National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Martin by selling milk to Martin at prices below National's cost.

The effects of the offense, it is alleged, have been to cause severe financial losses to small dairies doing business in

that market and to cause such dairies to suffer losses in sales volume.

When the Congress passed Section 3 of the Robinson-Patman Act, it condemned sales made below cost if it should be determined as a matter of fact that such sales were made, in the language of the statute, at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

By its enactment of Section 3, the Congress, in the exercise of the power vested by the Constitution, under the commerce clause, barred the use of interstate business to destroy local business through programs in which a particular company or individual would underwrite the losses of local price cutting campaigns.

The enactment of the Robinson-Patman Act was for the purpose of strengthening existing laws which were aimed at the specific economic weapon called predatory pricing.

When the Supreme Court and other courts, including this court, make use of such descriptive language as predatory pricing, we do so to describe in quick somewhat short-hand-type language but in quite accurate fashion, the business conduct that the Congress has proscribed as unlawful business conduct.

When the Congress passed Section 3 of the Robinson-Patman Act it prohibited sales at unreasonably low prices that were intentionally established for the purpose of destroying competition.

The Congress required proof of a predatory intent on the part of one charged with violation of Section 3 of the Robinson-Patman Act.

The law requires that proof of such an intent, proof of an intent to sell at unreasonably low prices in furtherance of a purpose of destroying competition, be made beyond a

reasonable doubt. Basically, Section 3 of the Robinson-Patman Act is directed at business conduct designed to destroy competition.

Now, of course, neither Section 3 of the Robinson-Patman Act nor any other law of Congress can be evaluated or applied in the abstract. It is quite clear that Section 3 is not to be applied to hold that every sale that is made below cost is to be determined to be a sale made at an unreasonably low price for the purpose of destroying competition or eliminating a competitor.

Sales made below cost which have a legitimate commercial objective and which are made without any specific intent to destroy competition would not fall within the prohibition of Section 3 of the Robinson-Patman Act.

There is little difficulty in calling to mind examples of sales that would be made below cost that would not, and could not under the law be considered as being within the prohibition of Section 3 of the Robinson-Patman Act. It is within your common knowledge that sellers are not infrequently required to make sales below cost to get rid of perishable goods that would soon be worthless unless sold immediately for whatever price the goods would bring.

Obsolescence of seasonal goods, sales of slow moving excess merchandise, and sales made in connection with a good faith liquidation of a business are other examples of sales with a legitimate commercial objective.

Pricing conduct involved in the sort of examples just stated involve sales below cost that are clearly made in furtherance of an obvious legitimate business objective, and therefore are not within the coverage of the statute.

If this case involved facts as simple as those examples, none of us would be as well acquainted as we now are.

The case on trial calls into play further legal principles

that you must apply to the facts as you find them. The point of beginning is that under Section 3 of the Robinson-Patman Act, as construed by the Supreme Court, sales below cost are not condemned if made in furtherance of a need to meet a lawful, equally low price of a competitor. If such is factually found to be the purpose of particular sales below cost, then such an instance would neither be unreasonably low, within the meaning of the statute, nor would such sales be made with the predatory intent required by law.

Broadly speaking, it is apparent that the evidence adduced in this trial by all the parties has been admitted so that you, the jury, may, under the guidance I give you concerning the applicable law, make factual determinations concerning the reasonableness of the alleged pricing conduct involved and to determine the presence or absence of the predatory intent necessary to be established beyond reasonable doubt as an element of conviction.

Several things must be said about the words that we have heard frequently here of "meeting competition."

The mere fact that a witness states that his company's pricing policy was justified by meeting competition or that the pricing policy was justified by the competitive situation, does not necessarily decide the issue, because such a statement and such testimony is simply a conclusion on the part of the witness.

This is not in any way to say that you should not give consideration to the testimony of witnesses that did testify that particular pricing conduct was for the purpose of meeting competition, because such testimony is relevant and may be considered by you in connection with your determination of the question of fact in regard to whether or not you believe, beyond a reasonable doubt, that the defendants acted with the predatory intent necessary for conviction.

As jurors, your ultimate judgment of the facts as you find them to be may or it may not agree with a particular witness' conclusion that particular pricing conduct, as you find the facts concerning that conduct to be, was or was not for the purpose of meeting a lawful, equally low price of a competitor.

The point of law that I instruct you is that it is your duty as jurors to find the facts and to reach your own conclusion as to the purpose of the pricing conduct as you find that pricing conduct to be from the testimony and evidence in this case.

Still another way, perhaps, to express something of the same thought and the same applicable legal principles is to call your attention to the language of a recent decision of the Supreme Court which states in its applicable part, that "in appraising the effects of any price cut or the corresponding response to it, courts—and the language is broad enough to include juries as an integral part of the courts in the administration of justice—must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas—and I suggest that the conclusion 'meeting competition' is such a formula and conclusion—cannot be made to substitute for adequate probative analysis."

Experience teaches us that a businessman does not deliberately and consistently sell at a loss in the usual course of his business without a special reason. It is for you to decide whether National did deliberately sell at a loss for a sustained period of time, if you find beyond a reasonable doubt that such was a fact, and, if so, whether the reason for such sale below cost was to destroy competition or to meet it.

I am sure that you understand that the law recognizes that there are two sides to the coin of the defense of meeting competition in good faith for a legitimate commercial

objective. I charge you that it is the law that if a seller offers a reduced price for no other reason than to meet the lawfully lower price of a competitor, then the seller's pricing falls within the protection of the good faith meeting competition defense.

As applied to this case, should you find from the evidence in connection with one of the distributor counts, for example, that Defendant National did in fact sell below its cost and that such sales might be unreasonably low sales, but you also found as a fact that Defendant National offered its reduced prices simply to meet the lawfully low price of a competitor, and you found in fact that a lawfully low price of a competitor was in existence when defendant reduced its price, then your verdict would be for Defendant National on that particular distributor count.

Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self defense against a price raise by a competitor.

I think both sides of the coin are made quite distinct by the quotation of the Supreme Court in two separate Congressional reports. The first case quoted a report of the Senate, which pointed out that liberty to meet competition could, under particular factual circumstances, become in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency.

The second case quoted a report of the House of Representatives, and in that connection, the House and the Senate stand on equal ground for the purpose in which I am calling attention to both sides of the coin. The House report stated that in any competitive economy, we can't avoid injury to some of the competitors. The law does not,

and under the free enterprise it cannot, guarantee business men against loss. That businessmen may lose money or even go bankrupt does not necessarily mean that competition has been injured.

The law holds that the mere recognition that harm sometimes may be a by-product of competition is the beginning and not the end of the probative analysis that must be made of the facts in this case. As the jury, you must seek out the facts in each particular count and make your determination.

I think I can next best introduce the next legal principle that you are to apply by reminding you of the testimony of one of the witnesses that the purpose of the pricing practice in a particular distributor area was, as he put it in his conclusory language, quote, to meet competition, not to kill it, end quote. You have heard a great deal of testimony in this case about two half gallons of paper versus glass gallon jugs, about spreads, differentials, and about meeting prices head-on, and about prices being on or off the nose. You have even successfully handled both paper and glass types of container up to and including the glass gallon jugs with the container full of milk, and I might parenthetically add, because the milk will not be in the record, that you handled all the milk filled containers, paper and glass alike, in an exemplary fashion that provided no occasion for the Court to have to suggest what should not be cried about.

All of the evidence admitted was admitted in order that the jury have evidence upon which it could make a finding of fact of whether or not under the evidence and under all the other evidence in this case, it can be said as defendants urge, that milk is merely milk and the type of container, paper or glass, has no real significance in fact. You must determine that fact and you must determine the companion question of fact as to whether or not pricing conduct that proceeds upon the theory that milk is milk, if you should

find that to be a fact, is a pricing policy designed to meet competition or whether it is a pricing policy designed to undercut the price of a particular competitor.

The law has long recognized as both experience and logic teach, that price differentials do in fact exist in connection with particular commodities on the market. It is within your own experience to have known motorists, and perhaps you may be one of them, to drive by several cutrate filling stations, even when he is almost out of gasoline, in order to get the privilege of paying a cent of two or perhaps more per gallon of gas in order that his gasoline tank be filled with gasoline that has a familiar name and is sold by one of the major oil companies that he has patronized for years without ever quite knowing why he started buying Standard or Phillips 66 or Shell or whatever brand it may be.

Such a motorist may expect more when he pays more for his favorite brand, but whether he gets more depends upon whether or not the cutrate station that he passed was or was not in fact selling gasoline that came from the same tank car as that purchased by the motorist who went to his major brand station as is sometimes the case.

The point is, that the motoring public is willing and does in fact pay more for particularly well known brands of gasoline than it will pay for unknown brands of gasoline. A known differential is one of the facts of economic life in the gasoline business.

I mention the gasoline business in this case only to illustrate that one of the factual issues that you must decide in this case involving the milk business relates to the question of whether or not National did in fact meet competition or whether or not its pricing practices, as you may find them to be, in fact undercut prices when it priced its twin packs or two of its half gallon paper at the same price as the various gallon jugs or at prices so close to the glass gallon jug

as to be considered below what the Govern- contends was an existing differential under normal marketing conditions.

If you find from the evidence that National simply approached or met and did not undercut the lawful lower prices established by competition, then I instruct you that it is entitled to a verdict of acquittal under that particular Robinson-Patman count. On the other hand, if you find beyond a reasonable doubt that National sold below cost and that such prices were unreasonably low for the purpose of destroying competition and make a finding of predatory intent beyond a reasonable doubt and find that the sale below cost was unreasonably low beyond a reasonable doubt, then you must return a verdict of guilty as to National under that particular count.

Related to the factual determination that you must make in regard to differential, there are additional questions of fact that you must determine in regard to whether or not National did or did not utilize the financial advantages that you may find it possessed in order to finance the price wars charged and alleged in the various Robinson-Patman counts. You must, of course, find beyond reasonable doubt that such price wars did in fact occur and you will direct your attention to the question of fact of whether National utilized its financial power, if you find beyond reasonable doubt that it had such power, to finance such price wars.

You must, of course, determine beyond reasonable doubt the question of whether or not each of the offenses alleged in the various Robinson-Patman counts had the effects alleged on the very small dairies doing business in the various marketing areas.

In connection with the questions under discussion, you must determine beyond reasonable doubt whether or not

Defendant National did in fact have assets from other sources and whether or not those assets were in fact used to underwrite the losses of local price cutting campaigns, if, of course, you find beyond reasonable doubt that National did in fact engage in local price cutting campaigns.

I charge you that under the law the type of price cutting alleged in the Robinson-Patman counts of the indictment, were legally foreign to any legitimate commercial competition, even prior to enactment of Robinson-Patman Act. I charge you that the Congress included that in its ban on the alleged type of pricing conduct alleged in the complaint, the type of conduct, that type of conduct when it did enact the Robinson-Patman Act.

The Supreme Court pointed out in a quite recent case that so long as the price cutter does not receive a price break from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. But such a presumption cannot be relied upon by a particular defendant if contrary facts are determined beyond a reasonable doubt. For to do so, would, to again borrow the Supreme Court's language, permit a competitor supplier—in this case the Defendant National—to bring his often superior economic power to bear and thus convert the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier, a contest which could hardly be called an exercise in reasonable and fair competition.

I do not, of course, by my statement to you concerning the law applicable to Section 3 of the Robinson-Patman Act intimate any judgment about whether or not the Government as established beyond reasonable doubt all of the many facts that the jury must find before either defendant is to be convicted in this case.

I emphasize again that there are two sides to the legal

coin and that you are to keep both sides in mind in your consideration and determination of the factual issues involved.

It should be clear to you, for example, that should you determine that the Government failed to prove beyond reasonable doubt any one of the elements of the offenses alleged in Robinson-Patman counts, in a particular distributor area or in Kansas City, that you must return a verdict of acquittal in such a situation. It is also clear to you, I am sure, that both defendants must be acquitted if you find that the pricing conduct of Defendant National, as you find it to be from all of the evidence applicable to a particular Robinson-Patman count, was in furtherance of a legitimate commercial objective—for example, that its conduct was in fact in response to a need to meet a lawful, equally low price of a competitor. In that event, even though its sales were in fact made below cost, they would not be unreasonably low in violation of the statute for the reason that you will have determined on the facts that such sales were made without any predatory intent to destroy competition or to eliminate a competitor.

It is your ultimate duty to determine, beyond a reasonable doubt, whether the prices at which sales were made were or were not unreasonably low. Of course, we are dealing with a law that establishes a standard of conduct for all persons in the United States that are subject to that law. That standard of conduct is that prices shall not be unreasonably low under the circumstances and with the intent stated in the statute. The standards of conduct, I instruct you, are the standards of a reasonable man. And they are external in application. The standards are not only external, but they are of general application to everyone.

Those general statutes do not require that every man should get as near as he can to the best conduct possible for him, but they do require that all men under the law

at their peril fail to come up to the height determined by a jury, acting in accordance with law, to be reasonable or unreasonable and for all men in the community.

Mr. Justice Holmes, in 1881, before he was a judge, put the case of the workman on the housetop. He suggested that if at midday such a workman "knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or in other words, is chargeable with knowledge of that fact also, whether he draws that inference or not.

"If he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not.

"If a death is caused by the act, he is guilty of murder. But if the workman has reasonable cause to believe that the space below is a private yard from which everyone is excluded, and which is used as a rubbish-heap, his act is not blameworthy, and the homicide is a mere misadventure."*

You will understand that juries have been determining fact questions concerning what is reasonable and what is unreasonable for quite a long time, because Mr. Justice Holmes took his example from one given by Blackstone

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* In his instructions on the Sherman Act, the trial judge charged that if defendants "intended to engage in the agreement charged, and you find this fact beyond a reasonable doubt, it is no defense to contend that they did not intend by their agreement to affect prices because the law presumes that persons must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary" (R. 7101-02).

who put the case of the man on a roof top over a hundred years before Holmes put it again in 1881.

In this connection, the Government urges that the sales were unreasonably low because they were below National's total costs, calculated on an average unit basis for that product, usually a half gallon of homogenized milk in a paper container, which the evidence shows is an item generally employed in the trade for measuring prices and costs.

Defendants dispute this and contend that their costs must be limited to the cost of raw milk plus the cost of paper containers. It is for you to decide whether or not the prices National charged were below cost and were unreasonably low. You may take into account the different comparisons which have been introduced which showed not only total costs, and costs of raw milk plus containers, but also the cost to the cooler and yet other comparisons, with which I am sure you are familiar.

You may also take into account whatever the evidence showed as to whether or not National's Kansas City plant suffered losses in the sales to any of the markets involved during the periods in question. Of course, the question of whether or not the low price charged is unreasonable will also depend upon the purpose behind it about which I have attempted to instruct you fully.

Because I commenced my general charge concerning Section 3 of the Robinson-Patman Act by reference to Count 13 involving the Kansas City market, and by reference to Count 2 in reference to Osawatomie, I shall close this portion of my charge with a specific reference to both those counts.

(R. 7145-47)

Now, in specific regard to Count 13, involving the Kansas City market and involving both Defendant National and Defendant Wise, I instruct you that if you find beyond a reasonable doubt that the defendant National sold milk

below its cost, and that such prices were unreasonably low, for the purpose of destroying competition in the greater Kansas City market, then you must return a verdict of guilty as to National under Count 13 of this indictment.

On the other hand, if, after considering all the evidence, you are not convinced beyond a reasonable doubt that defendant National sold at unreasonably low prices or that it set prices with the purpose of eliminating competition in the greater Kansas City market, then you must return a verdict of acquittal as to National under Count 13.

I instruct you that before you can find Defendant Wise guilty under Count 13, the Robinson-Patman charge, you must first find beyond a reasonable doubt the Defendant National guilty as charged in Count 13, and in addition thereto, that Defendant Wise either aided, abetted, counselled, induced or procured the commission of the offense by National.

In that event, but only in that event, you may then find Wise guilty as charged in Count 13. Otherwise, of course, you must return a verdict of acquittal as to Defendant Wise under Count 13.

I will charge you specifically as to Count 2, because this will advise you at this point how the final paragraph of all of the Robinson-Patman distributor count charges will state the ultimate fact that you will decide.

In specific regard to Count 2 involving the Paola-Osawatomie market, and involving only the Defendant National, I instruct you that if you find from the evidence, beyond a reasonable doubt, that National did sell below its cost to Merle Martin, and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 2 of the indictment.

If, however, you are not convinced beyond a reasonable

doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 2.

I have reached the point in my charge where the next transition is to a discussion of the specific counts.

(R. 7169-7170)

In regard to the Robinson-Patman count, as alleged in Count 2, you must determine whether or not National sold milk to its distributor, Merle Martin, at unreasonably low prices for the purpose of destroying competition in that market; as to whether or not defendant National, in fact, used any economic advantage that you may find it in fact possessed, to finance any price war by selling milk to Martin below Martin's cost; and whether or not, as a matter of fact, the effect of that offense, if you so find, did in fact cause severe financial losses to the dairies that you find were doing business in that market.

(R. 7174-75)

Count 4 of the indictment charges a Robinson-Patman Act violation in the Sedalia, Missouri market. The indictment, as modified by the bill of particulars, charges that beginning about July 16, 1957, and continuing until about February 24, 1958, and from about March 13, 1958, and continuing until about August 30, 1958, National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributors, such as Raymond Newton, in the Sedalia market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged, National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Newton by selling milk to New-

ton at prices below National's cost. The effects of the offense, it is alleged, have been to cause severe financial losses to small dairies doing business in that market and to cause such dairies to suffer losses in sales volume.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Newton and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 4 of the indictment. If, however, you are not convinced beyond a reasonable doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 4.

(R. 7178-79)

Count 6 of the indictment charges a Robinson-Patman Act violation in the Lexington, Missouri market. The indictment, as modified by the bill of particulars, charges that beginning in about October, 1957, and continuing until about May, 1958, National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributor, that is, Chester Heyer, in the Lexington, Missouri market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged, National utilized the advantages it possessed, which I have already described, to finance a price war against small dairies selling milk in competition with it and Heyer by selling milk to Heyer at prices below National's cost. The effects of the offense, it is alleged, have been to eliminate competition in the Lexington, Missouri market and to drive small dairies from that market.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Heyer, and that such prices were unreasonably low, for the purpose of eliminat-

ing competition, then you must return a verdict of guilty as to Count 6 of the indictment.

If, however, you are not convinced beyond a reasonable doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 6.

(R. 7183-84)

Count 8 of the indictment charges a Robinson-Patman Act violation in the Mexico, Missouri market. The indictment, as modified by the bill of particulars, charges that begining about March 14, 1957 and continuing until about March 20, 1957, and beginning about March 22, 1957, and continuing until about January 19, 1959, National, while engaged in interstate commerce and in the course of such commerce sold milk to its distributor, that is Audrain County Dairy or Dick Isaacs, in the Mexico, Missouri market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Audrain County Dairy by selling milk to Audrain County Dairy at prices below National's cost. The effects of the offense, it is alleged, have been to cause milk to be sold below cost and to cause severe financial losses to some dairies doing business in the Mexico, Missouri market and to cause such dairies to suffer losses in sales volume.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Audrain County Dairy and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 8 of the indictment.

(R. 7189-90)

Count 10 of the indictment charges a Robinson-Patman Act violation in the Glasgow, Missouri market. The indictment, as modified by the bill of particulars, charges that from approximately July 1, 1957 and continuing until about July 31, 1957, and that beginning about February, 1958, and continuing until about May, 1958, National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributor, that is Paul Craig, in the Glasgow, Missouri market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Paul Craig by selling milk to Paul Craig at prices below National's cost. The effects of the offense, it is charged, have been to cause severe financial losses to the small dairies doing business in the Glasgow, Missouri market and to cause such dairies to suffer substantial losses in sales volume.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Craig and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 10 of the indictment. If, however, you are not convinced beyond a reasonable doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 10.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 758

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A–1 to A–34) is reported at 350 F. 2d 321. The opinion of the district court denying petitioner's post-trial motions (Pet. A–37 to A–60) is reported at 231 F. Supp. 663.

JURISDICTION

The judgment of the court of appeals (Pet. A–35) was entered on August 27, 1965. A timely petition for rehearing was denied by the court of appeals on September 23, 1965 (Pet. A–36). On October 6, 1965, Mr. Justice White extended the time for filing a petition of certiorari to November 23, 1965. The petition was filed on November 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it denied petitioner's motions to inspect the transcript of the grand jury testimony of witnesses at the trial whose recollection the government attempted to refresh by their grand jury testimony under careful safeguards prescribed by the court.

2. Whether the district court correctly instructed the jury concerning the application of Section 3 of the Robinson-Patman Act to sales below cost made for the purpose of destroying competition.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, and Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, are printed (in pertinent part) at p. 3 of the petition. Rule 6(e) of the Federal Rules of Criminal Procedure is printed (in pertinent part) at p. A–71 of the petition.

STATEMENT

National Dairy Products Corporation (National) is a large company that processes, manufactures, and sells throughout the Nation dairy products and other foods. Through its Sealtest Foods Division, it operates a plant in Kansas City, Missouri, which processes and distributes milk in paper cartons for sale in the greater Kansas City area and in rural communities in Missouri and Kansas. After a two-month trial, National was acquitted on two counts and convicted on 13 counts of an indictment charging it with having conspired to fix prices and eliminate competi-

tion in the sale of milk, in violation of Section 1 of the Sherman Act, and with having sold milk below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act.[1] The violations were committed in the greater Kansas City area and in 5 rural markets. There was a Sherman Act and a Robinson-Patman Act charge in each rural market; and two Sherman Act charges (covering different periods) (counts 11 and 12) and one Robinson-Patman charge (count 13) in the greater Kansas City market.

1. THE EVIDENCE

The evidence showed that National had conspired with its competitors in the Kansas City market and with its independent distributors in the rural markets to fix milk prices, and that it had sold milk at below-cost prices for the purpose of driving other dairies out of business or subjecting them to National's pricing policies. The primary targets of

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[1] Before commencement of the trial, two interlocutory appeals were taken directly to this Court. *United States* v. *Wise*, 370 U.S. 405, held that corporate officials are personally liable under the Sherman Act for actions on behalf of their corporation which violate the act. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, held that Section 3 of the Robinson-Patman Act, which makes it a crime to sell "at unreasonably low prices for the purpose of destroying competition * * *," was not unconstitutionally vague as applied to the instant indictment, which specifically charged that the unreasonably low prices in this case were sales below cost.

The appellee in *United States* v. *Wise*, Mr. Raymond J. Wise, a vice president and director of National, formerly in charge of its Sealtest Central Division, was also convicted. He did not perfect an appeal from the conviction.

National's predatory campaign were small dairymen selling low-priced milk in glass gallon jugs which competed heavily with National's milk in paper cartons.

In the five rural markets, National conspired to fix prices with independent dairy distributors who purchased milk from its Kansas City plant and resold it locally. National concedes that during the relevant period it sold milk in these markets below its own cost for raw milk plus processing and packaging (Pet. 7).

National conducted its campaign against its competitors in the rural markets by obtaining from its independent distributors in those markets an agreement to follow resale prices set by National in return for a guarantee that they would enjoy a gross profit margin no matter how low prices might be set (Tr. 2913, 2918–2921, 3325–3330, 3872–3875, 3938, 4058–4060, 4093–4094, 4207, 4215–4217). By lowering these resale prices, National could regulate the price spread between paper half-gallons of Sealtest and cartons or glass gallon jugs sold by local competitors. And by keeping its local prices at a low level for a period, even though it operated at a temporary loss in those markets, it could attract most of its competitors' customers. The small operators with which it competed could not withstand such pressures. National used its power to force several small family dairies and jug dealers out of business entirely (Tr. 4179–4181, 3103, 3164, 4227–4233, 4257–4268); and to force others to stop handling jugs (Tr. 4057–4066), or at least to comply with its directions as to the proper price dif-

ferential which should exist between jugs and paper cartons (Tr. 3361, 3404, 3408, 3528, 4300–4312).

In the Greater Kansas City market, National conspired to fix prices during two different periods (September–October 1957 and June–October 1958), and sold below its fully allocated costs in that market between July 14 and August 27, 1958.

The first price fixing conspiracy involved National and Raymond J. Wise, head of its Sealtest Central Division (Pet. 4; see p. 3, n. 1, *supra*), and three other dairies—Borden Company, Fairmont Foods Company, which operated Country Club Dairy, Foremost Dairies, Inc., and certain of their officials. There were two targets of the conspiracy—the glass jug operators and Hawthorn Mellody Dairy which had been selling milk to Milgrim Food Stores at a 13 percent discount. (Tr. 341, 6131.)

The conspiracy was carried out through a series of phone calls and meetings in Kansas City and in National's Chicago office (*e.g.*, Tr. 1009–1016, 418–419, 457–462; 6300, 1618, 674; 1620, 1623; 668–670; 242–245; 1624–1627, GX 167–A), as a result of which the price for a half-gallon of milk in cartons sold by the conspiring dairies moved in less than a month from 37¢ down to 33¢, then up to 41¢ and back down to 39¢ (GX 101, 104, 104A; Tr. 1804). During this price maneuvering, the gallon jug operators were warned that the spread between jug and carton would have to be narrowed to no more than a 5¢ differential (Tr. 707, 2365–2367, 668–672, 1044–1046, 1669–1670, 2357–2358).

By the spring of 1958, the Kansas City milk market was again highly competitive. National proposed a plan under which prices would be lowered until the competition was weakened, and then raised. Its co-conspirators, Borden Company, Fairmont Foods Company, and Foremost Dairies, Inc., initially rejected this proposal, but they subsequently joined in executing it.

Between June and October 1958, there was an elaborate series of meetings, phone conversations and communications involving National, Borden, Fairmont, Foremost and occasionally Hawthorn Mellody. Discussions of milk pricing took place in Wise's hotel room in Kansas City and St. Louis; in his Chicago office; among local officials of the dairies involved, and elsewhere (*e.g.*, Tr. 922–923; 273, 278–280, 925–926; 928–930; 1070–1072; 541, 6413, 6417; 938–939, 874–875, 1266; 1614–1616; 295–296, 1278; 1645–1646, 880, 2470–2471, 1553; 6434–6435, 879; 654, 882, 6435–6436; 883–884, 948–951, 1104–1105, 1777–1780; 949–951, 1104–1109). National's object was to obtain a "sound" market, which it defined as one from which gallon jugs, spot pricing and two-for-one sales, as well as the Milgrim discount, had been eliminated (Tr. 270–278).

The other dairies first attempted to raise prices on July 1, 1958, but the attempt failed because National would not join (Tr. 872, 939, 1042, 1206, 1209, 6474, 1804). The dairies then adopted the first step in National's plan. On July 14, 1958, all major dairies but one (which was not a member of the conspiracy), reduced milk prices (GX 103). A week later they

dropped by-product prices (Tr. 6434–6435, GX 108). Then on August 1, Borden, Fairmont, Foremost and Hawthorn Mellody adopted a discount schedule proposed by National which eliminated the Milgrim stores discount (GX 109).

The agreed-upon price cuts forced the jug operators to comply with the conspirators' instructions concerning the price at which they would sell milk (Tr. 2098–2099, 2244, 2252–2253, 2369). By August 27, 1958, the conspirators could safely raise their prices, which they did simultaneously; they again raised them simultaneously in October (GX 103, 108).

During the entire July 14–August 27 period, National sold below its fully allocated cost. In August it was selling for 6¢ below its total plant and delivery costs (GX 17), and it suffered losses of more than $46,000 in July and more than $73,000 in August on its operations in the greater Kansas City area. After the August 27 rise, it was breaking even on its daily unit sales (GX 103, 108); after the October rise it began to make a profit (GX 103, 108).

2. THE GRAND JURY TRANSCRIPT

During trial of the Kansas City charges (counts 11, 12 and 13) the government requested leave of the court to refresh the recollection of certain witnesses who had testified before the grand jury by reading to them portions of their grand jury testimony. The trial judge established in advance a procedure for handling such requests, to which petitioner did not object (Tr. 425–452). Instead, it moved for disclosure of the portions of the grand jury transcript

which the government proposed to use in attempts at refreshment and also the related portions (Tr. 447; Pet. A–77, A–102 to 103, A–120 to 121, A–127). The motion was denied. Thereafter, under close supervision by the court, the transcript was used in attempts (only a few of which produced affirmative testimony) to refresh seven witnesses, all of them officers or employees of the dairy companies involved (Pet. A–73–74).[2] The court repeatedly instructed the jury that only the witness' present recollections were to be considered as evidence (*e.g.*, Tr. 449–452; 1278–1279; 6368–6369). Petitioner never objected that the transcript was being used to impeach or as substantive evidence (Pet. A–19).

3. THE CHARGE TO THE JURY

The trial judge's charge to the jury (Tr. 7059–7201) discussed separately the Sherman Act (Tr. 7092–7116) and the Robinson-Patman Act (Tr. 7116–7147), and then specifically charged on each count individually (Tr. 7149–7196). As to the Robinson-Patman Act, the judge emphasized that proof of intent to sell at unreasonably low prices was required by the statute. He also charged that it was for the jury to determine "whether or not the prices National charged were below cost and were unreasonably low" (Tr. 7143). The jury found National guilty on six counts under the Robinson-Patman Act and seven counts under the Sherman Act.

[2] See Tr. 453–456; 475–476; 498–503; 506–507; 515–521; 534–538; 637–640; 641–644; 825–829; 1006–1008; 1012–1014; 1018–1021; 1033–1035; 1073–1078; 1082–1083; 1097–1100; 1238–1240; 1250–1252; 1276–1279; 5523–5524; 6361; 6362–6363; 6365–6371; 6415–6417.

4. THE DECISION OF THE COURT OF APPEALS

After the district court had denied petitioner's post-trial motions (Pet. A–37 to A–60), petitioner appealed on a broad range of issues. The court of appeals discussed the principal contentions in detail (Pet. A–1 to A–34). It held, *inter alia,* that the district court had not abused its discretion in denying defendants' motion to inspect the portions of the grand jury transcript relating to the material used in attempts at refreshment (Pet. A–17 to A–22), and that the court's charge to the jury was not erroneous (Pet. A–22 to A–30). It concluded (Pet. A–34):

> This prosecution has produced a history of every conceivable motion and numerous legal memoranda. The case has twice been to the Supreme Court. From the filing of the indictment to the filing of the notice of appeal fourteen volumes of "pleadings" have been amassed. In such a hotly contested and protracted legal battle, mistakes do occur. "The human element cannot be eliminated from lawsuits." But, as always, the crucial question is, were there any mistakes or errors of a prejudicial nature? We conclude there were not.

ARGUMENT

1. The court of appeals properly concluded that the trial judge did not abuse his discretion when he determined that in the circumstances of this case it was not necessary to disclose to defense counsel portions of the grand jury transcript in addition to those which had been used to refresh the recollections of certain witnesses.

The grand jury transcript was used during trial of the Kansas City charges in 24 attempts to refresh the recollections of seven witnesses. Five of these witnesses had been named in the indictment as individual co-conspirators; four were officers or employees of petitioner; one was a former sales manager of, and was still employed by, Fairmont Foods Co., a corporate co-conspirator; and one was the former sales manager of Hawthorn Mellody Dairy. These witnesses had proved to be hostile, evasive and forgetful when questioned by the government.

To avoid any possible prejudice to defendants, the court limited the government's use to the minimum necessary to refresh and required strict observance of procedures designed to prevent any abuse. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 231–237.[1] *First,* the government was required to mark and identify in advance to the court not only the particular grand jury testimony that might be used for refreshment but also all related material. *Second,* the court reviewed the entire subject matter and itself determined whether any question would have the effect of refreshing the witness' memory (Tr. 435, 440, 441, 1222). *Third,* the court declared that it would con-

[1] In *United States* v. *Socony-Vacuum Oil Co.*, grand jury minutes were used to refresh some 90 times without disclosure of additional portions to defense counsel. This Court held that disclosure was a matter for the discretion of the trial judge and that its discretion is not abused if: the grand jury transcript is used solely for refreshment, not impeachment; the court devises an appropriate procedure to prevent use of the material as affirmative evidence or for impeachment; the jury is properly instructed; and the entire procedure is administered fairly. 310 U.S., pp. 231–237.

sider unfair and would bar any attempts to refresh with statements that the witness had recognized as mistaken and had later corrected before the grand jury (Tr. 434). *Fourth*, the transcript was not to be shown to the witness. Government counsel were required to refresh in substantially the same language as the testimony before the grand jury. They were forbidden to read in "an accusatory manner" or with "histrionics" or to attempt in any other manner to "wool the witness around" (Tr. 436). The court retained the original transcript to follow the reading by government counsel (Tr. 443). *Fifth*, the court stated that it would modify the procedure if experience showed that the interests of fairness required it (Tr. 447–448).

Before any attempt had been made to refresh any witness, petitioner moved to examine portions of the transcript relating to the subject matter of the proposed refreshment, which portions the government had marked and submitted to the court (Tr. 447). The court denied the motion. Petitioner never moved for specific disclosure after a witness' recollection was actually refreshed. Nor did petitioner ever object on the ground that the minutes were being used to impeach or as substantive evidence. It is the trial judge's denial of petitioner's blanket motion for examination of the transcript that petitioner asks this Court to review.

Every assessment of demands for disclosure of grand jury testimony begins with the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United*

States v. *Procter & Gamble,* 356 U.S. 677, 681; *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399; *United States* v. *Socony-Vacuum Oil Co., supra,* pp. 231–237; F.R. Crim. P. 6(e). The policy is concerned with protection of the grand jury's effectiveness as an instrumentality for uncovering crime. One of the primary reasons for grand jury secrecy in antitrust cases "is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States* v. *Procter & Gamble, supra,* p. 682.

Inevitably, narrowly limited departures from the policy are required. Witnesses at trial do not always testify as freely as in the grand jury room. Because of the inability or unwillingness of a witness to remember at the time of trial, the government sometimes is under a compelling need to use the grand jury minutes, as it did here, to refresh the witness' recollection. When the grand jury transcript is used in this manner, defendants have an interest in assuring that testimony developed through its use is not distorted, inaccurate, or the product of improper suggestion. A witness' grand jury testimony may contain passages which contradict, qualify, or explain the passages relied upon by the government. Defendants here desired to search through all related

portions of the grand jury transcript for such material, arguing that the use of the transcript by the government for purposes of refreshment automatically creates a particularized need for the broader breach of secrecy entailed by defendants' search of the related portions of the transcript.

Competing interests thus exist: the interest, oft-recognized by this Court, in preserving the secrecy of grand jury proceedings, and the interest of defendants in assuring that use of the minutes to refresh does not unfairly prejudice them. The court of appeals in this case, like this Court in the cases cited *supra,* recognized that a proper balancing of the weight of defendants' needs against the weight to be accorded protection of the grand jury's functions by maintaining maximum secrecy requires that much be left to the sound discretion of the trial judge. Rigid rules cannot determine whether a particularized need for a further breach in secrecy has been established. The trial judge can, for he has observed the evidence unfolding before him and he will guide the jury in considering it.

In this case no question is presented concerning the use of the grand jury transcript to impeach, or its independent use as affirmative evidence (Pet. 16, n. 28).[4] Nor does this case involve the denial of spe-

[4] Petitioner apparently had no fear that the limited use of the grand jury transcript at the trial might have had the incidental effect of impeaching the witnesses or serving as affirmative evidence since it did not raise this question in its motions to the trial court, nor did it request that the excerpts be read to the witnesses out of the presence of the jury. Thus no such problem is presented here. Moreover, the trial judge carefully

cific motions for disclosure made after particular instances of successful refreshment and based on an asserted need for further disclosure to meet particular testimony developed in those specific instances. The only grand jury question that this record presents is whether, in this particular proceeding, the trial judge abused his discretion under the standards of *Socony-Vacuum*[5] in denying a broad motion that matter in the grand jury transcript relating to portions used by the government in *attempts* at refreshment must be disclosed whether or not the attempt produced affirmative testimony. We submit he did not.

Great care was taken in observing the safeguards prescribed by the court. Government counsel recognized that if the witness' recollection was not refreshed, "that is the end of it" (Tr. 5521). To ensure that the jury did not treat as evidence the extracts read to witnesses, the court carefully (and repeatedly: Tr. 449–452; 564; 829–830; 1278–1279; 6368–6369; 7074–7075) instructed them as follows: If the witness said that his recollection had been refreshed by hearing his grand jury statements and that his present testimony was in accord with his earlier testimony, "that is evidence in the case." But if the witness said that the reading did not help him recall, "then you are not to consider the questions and answers that he gave before the grand jury as evidence in this case" (Tr. 449–452). On various occasions, the court

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guarded against such a possibility by repeatedly instructing the jury that if the recollection of the witness was not refreshed, the excerpt read from the grand jury transcript must be disregarded.

[5] Petitioner does not ask that *Socony-Vacuum* be reexamined.

refused government requests to refresh with certain extracts because, in the court's view, they did not tend to refresh or because a proper predicate had not been laid (Tr. 1005; 1220–1221; 1034; 1249; 6367). It promptly corrected a reading which deviated from the actual transcript (Tr. 1251–1252) and explained the context of material to be sure the witness understood it (Tr. 642–643; 826–827).

Petitioner was not prejudiced by the government's efforts to refresh. On only three occasions out of 24 attempts did witnesses declare they were refreshed (Tr. 1021, 1035, 1083). In six other instances the witnesses testified, in substance, that, while not refreshed, "if that is what I said before the grand jury it must be true" (Tr. 636–640; 825–829; 1006–1008; 1097–1100; 1238–1240; 6413–6417). Petitioner did not move to strike any of this testimony on the ground that it did not represent present recollection. On the fifteen other occasions, the witness testified that he was not refreshed, and the matter was at an end.[6]

The little affirmative testimony actually produced by refreshment proved to be either cumulative or peripheral. Thus, petitioner's contention that the refreshment proved "critical to the prosecution" (Pet. 14) is without foundation.[7]

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[6] Tr. 453–456; 473–476; 498–503; 505–508; 515–521; 534–537; 641–644; 1012–1014; 1073–1078; 1248–1252; 1275–1279; 5523–5524; 6353–6361; 6364–6371; 6413–6417.

[7] Petitioner points to only two examples of allegedly "substantial prejudice" (Pet. 5, n. 5). But in both of these the witness clearly stated that he was not refreshed and no affirmative evidence was produced which petitioner would have "to explain or place in perspective" (Pet. 5). In one example, government counsel, after first reminding the witness that he had

2. The court of appeals found that the trial judge's five-hour charge on the eight Sherman Act and seven Robinson-Patman Act counts was exhaustive, comprehensive and fair (Pet. App. A–23).

Under the court's instructions on the Robinson-Patman Act counts, the jury was to decide whether National had sold below cost. Whether it found sales below direct cost, or above direct cost but below fully distributed cost, it was to assess the relevant business evidence to determine whether the sale prices were unreasonably low (Tr. 7141–7144). It was told that it could not find sales prices below cost to be unreasonable if they were in furtherance of a legitimate commercial objective, such as to meet the lawful, equally low price of a competitor (Tr. 7125–7140). And it was repeatedly instructed that it could not convict unless it also found a specific intent to destroy competition (Tr. 7122–7124, 7136, 7140, 7141, 7146).

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later testified before the grand jury to a 27 cent figure in a price list, read an earlier extract relating to a 25 cent figure. Following the reading, the witness firmly testified that the figure was 27 cents and explained why the earlier grand jury testimony had been inaccurate (Tr. 1073–1078). Petitioner did not move to have the later grand jury testimony read to the witness, nor was such a motion necessary in view of the affirmative testimony. The second example related to grand jury testimony by a National official that gallon jug operators had been a small competitive factor in Kansas City. The witness stated that he did not remember this and the court made it plain to the jury that no affirmative testimony had been produced (Tr. 5523–5524).

In *United States* v. *Socony Vacuum Oil Co.*, *supra*, the Court noted that the record in that case, even without the little affirmative testimony produced by refreshment, established all the facts needed to prove the illegal conspiracy. This was equally true here.

(*a*) In *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, this Court ruled that Section 3 of the Robinson-Patman Act was not unconstitutionally vague as applied to "sales made below cost without legitimate commercial objectives and with specific intent to destroy competition" (372 U.S., p. 37). It did not undertake to define whether "costs" meant sales below direct costs or sales below fully distributed costs, since the proof might show that National's sales had been below any of these levels. 372 U.S., pp. 34–35. This was subsequently proved to be the case in five of the six markets here involved, because, in the rural markets, National concededly (Pet. 7) had sold below its direct costs. As to the lone remaining count under Section 3 (Kansas City, count 13), the issue of direct versus fully distributed costs does not merit review.

The charge plainly did not *require* the jury to convict if it found sales below fully distributed cost. To convict, the jury necessarily had to find that National had a specific predatory intent to destroy competition (Tr. 7122–7124, 7136, 7140, 7141, 7146); that it was deliberately selling at least below its "total costs, calculated on an average unit basis" (Tr. 7143); and that the sales had not been made in furtherance of a legitimate commercial objective (Tr. 7125–7140). The reasonableness of National's pricing was tested under instructions which expressly set this determination in a framework of common sense and common business experience (Tr. 7128–7129). That National's prices were above its direct costs in Kansas City, but below its fully distributed costs per unit, as proved from its

own records, did not make them reasonable. Sales deliberately and unjustifiably made below established business criteria such as fully distributed costs, and coupled with a predatory intent, fall squarely within the prohibition of the statute.

(*b*) There is no basis for the contention that the instructions permitted conviction under the Robinson-Patman Act upon a finding of general intent rather than a specific purpose to destroy competition. The trial court carefully and repeatedly pointed out that Congress required proof of a predatory intent and that sales "which are made without any specific intent to destroy competition would not fall within the Act" (Tr. 7122–7124). Petitioner points to no language in the judge's Robinson-Patman instructions that permitted the jury, in contravention of the judge's repeated emphasis on specific intent, to convict on general intent. Petitioner refers (Pet. 22) only to a portion of the charge instructing the jury how to determine when sales are unreasonably low. The judge emphasized in that instruction that the standard of reasonableness is objective and external; as a familiar example of external standards of reasonable behavior, he gave the illustration of the workman who throws a beam from a scaffold in circumstances which persons of ordinary prudence would recognize as dangerous to life and limb (Tr. 7141–7144). The context clearly shows that the judge was not speaking of

intent and, as the court of appeals held, the jury was plainly not misled (Pet. A–27 to A–28).[8]

(*c*) Petitioner also urges (Pet. 23) this Court to review the trial judge's instructions on good faith meeting of competition. It contends that the trial court mistakenly treated this as a defense. But the jury had been clearly instructed that the government had to prove beyond a reasonable doubt the statutory elements of (1) sales "at unreasonably low prices [(2)] for the purpose of destroying competition or eliminating a competitor," and that "[i]f [meet]ing a lawful, equally low price of a competitor * * * is factually found to be the purpose of partciular sales below cost, then such an instance would neither be unreasonably low, within the meaning of the statute, nor would such sales be made with the predatory intent required by law" (Pet. A–193). Compare 372 U.S., p. 37.

This Court has made clear (372 U.S., p. 36) that the burden of coming forward with evidence on meeting competition lies with the defendant. The government is not required to negative defendant's possible justifications, for the latter is obviously best situated to develop exculpatory facts. See *Ben Hur Coal Company* v. *Wells*, 242 F. 2d 481 (C.A. 10), certiorari de-

[8] Petitioner attempts to support its argument in this respect by appending as a footnote to its printed version of the instructions a short extract from the Sherman Act portion of the charge dealing with general intent under Section 1 of that Act (Pet. 22, A–201, n.). But the jury clearly understood the different standards under the Sherman and Robinson-Patman Acts, for the judge had told them he would charge separately under the two statutes and he carefully did so (Tr. 6063; 7092–7116 (Sherman Act); 7116–7147 (Robinson-Patman)).

nied, 354 U.S. 910. Under the trial court's instructions, however, the government had the ultimate burden and it carried the risk of failing to overcome evidence from which the jury might sustain the defense. That is all petitioner could reasonably demand.

Petitioner says that its burden on meeting competition was made more difficult because the trial court's instructions contemplated that competing prices be lawful and actually in existence (Pet. 25). But this Court had expressly stated that sales below cost are not condemned when made in furtherance of "the need to meet a lawful, equally low price of a competitor." 372 U.S., pp. 36–37. See, also, *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746, 753–754; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 247, n. 14. And petitioner does not contend that there was any real issue at trial as to whether the prices charged by National's competitors in fact existed.[9]

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[9] Petitioner also complains that it was prejudiced with respect to "meeting competition" by two remarks contained in the instructions. The court warned the jury that a witness' conclusory statement that prices were cut to meet competition did not of itself resolve the issue. This was not an inappropriate warning since it had to be made clear to the jury that *it* was to decide this issue. In the same portion of the charge the court also referred to the familiar differentials in gasoline prices encountered by motorists among various service stations. This also was not inappropriate since price differentials between paper cartons and milk were characteristic of the pricing structure which the jury would have to consider in determining whether reductions were aimed at meeting or beating competition. These objections relate simply to minor details of a long and difficult instruction. They were illustrative only, and in context were not prejudicial.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966

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FILED
MAR 26 1966
JOHN F. DAVIS, CLERK

No. 758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Dated: March 1966

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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REPLY BRIEF FOR PETITIONER

QUESTION 1

The Government's Use of Grand Jury Transcript for Witness Refreshment

The Brief for the United States in Opposition[1] fails entirely to meet or even to discuss petitioner's fundamental position and authorities that a particularized need for limited disclosure to the defense arises when grand jury transcript is used by the prosecution "'to impeach a witness, *to refresh his recollection,* to test his credibility and the like'." *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959) (emphasis added); *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 683 (1958). (See Pet. 10-13).

1. Hereinafter cited "GB. . . ." The Petition for a Writ of Certiorari is cited "Pet. . . ."

The Government admits that when the prosecution uses grand jury transcript for purposes of refreshing a witness' recollection, "defendants have an interest in assuring that testimony developed through its use is not distorted, inaccurate, or the product of improper suggestion. A witness' grand jury testimony may contain passages which contradict, qualify, or explain the passages relied upon by the government" (GB 12). Notwithstanding this admission, and despite the above-quoted statement of principles in *Pittsburgh Plate Glass* and *Procter & Gamble,* the Government takes the position that petitioner was not entitled to limited disclosure of grand jury transcript utilized for refreshment because (1) the requested disclosure involved a "blanket motion for examination of the transcript" (GB-11); (2) the court prescribed and carefully observed certain "safeguards" for the refreshment procedure followed; and (3) the grand jury refreshment procedure involved matters of little importance and the defense was not prejudiced.

1. In its version of the first question presented in this matter (GB 2), and in other instances in its opposing brief (GB 11-14), the Government implies that the defense made a general, over-broad demand to inspect the grand jury transcripts used for witness refreshment. In fact, in each instance, the defense carefully limited its request for disclosure to (1) the portions of the transcript actually read to a particular witness, and (2) additional portions of the testimony of the same witness on the same subject matter (see Pet. A-102-103).[2] Furthermore, contrary to the implication that petitioner wanted to conduct a wholesale "search" through the grand jury transcript (see GB 12-13), defense counsel even went so far as to offer to accept

2. The defense made similar motions, similarly limited, whenever the grand jury transcript refreshment procedure was used (see Pet. A-77, 102-104, 120-21; 127, 157-58, 173, 174-175, 177-79).

Government counsel's designation of other testimony of the witness covering the same subject matter as that disclosed during the refreshment, without further review by the court or defense counsel to ascertain that this was in fact all that was said on the subject.[3]

2. The refreshment procedure adopted by the court as a "safeguard" to petitioner's interests simply involved the trial judge's reviewing designated portions of the transcript to make sure that the designated material was calculated to refresh the witness' recollection; that the statement was not later corrected; and that Government counsel read the designated portions of the transcript accurately and without histrionics (see GB 10-11). There is no indication that the trial judge undertook to analyze the other portions of the witnesses' testimony on the same subject matter to determine if they explained or qualified, or were inconsistent with, the testimony utilized by the prosecution. Indeed, in two instances cited in our petition (p. 13, n. 25), it is clear that the trial judge did not adequately protect petitioner's rights.

But even if the trial judge had undertaken to analyze the grand jury testimony of witnesses who were refreshed in a search for explanatory or qualifying material, this would not adequately protect petitioner's rights. Only counsel for the defense is equipped to undertake this task (see Pet. 12).

In any event, the rights of a defendant in this regard should not be dependent upon the circuit in which he is brought to trial, or the particular trial judge presiding.

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3. The defense stated its willingness "to accept Mr. Jinkinson's [chief counsel for the prosecution] representation to the Court to save the Court the burden of going through the whole thing that this is all the man said on the subject . . ." (R. 427).

In the present case, the trial judge not only denied defense motions for limited disclosure but questioned his right to compel the requested disclosure of appropriate portions of the grand jury transcript (see Pet. 10, n. 19). In marked contrast, Judge R. Dorsey Watkins of the United States District Court for the District of Maryland, under precisely similar circumstances in *United States* v. *H. E. Koontz Creamery, Inc.* (Cr. No. 26128), granted defense requests for limited disclosure of grand jury transcript, stating to Government counsel: "[I]f you use the testimony, then the other side has the right to examine any [relevant] portions. . . . [The witness] may have made one statement at one time and then he may have had a different refreshment which led him to a different conclusion . . . it would seem to me that if you use it for the purpose of seeking to have him testify along the particular line, then the other side is entitled to examine any portions of the testimony bearing upon the same thing."[4]

The restrictive holding by the Court of Appeals for the Eighth Circuit on this point is entirely inconsistent with the more liberal disclosure rules followed in other circuits (see Pet. 12, n. 23). The very fact that conflicting rules are followed in the federal circuits and among different district judges with regard to disclosure of grand jury transcript utilized for witness refreshment provides strong reason for the grant of certiorari in this case. A ruling by

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4. In response to the Government's argument that an effort would be made only to elicit present recollection on a particular point, Judge Watkins stated: "But his present recollection may change to something else two minutes later if he is shown something further. His present recollection does not establish the fact. . . . there may have been some question asked him later on which will lead him to a different present recollection." (Transcript of Hearing, July 13, 1965, pp. 433-35).

this Court on the subject is necessary for uniformity in administration of criminal justice.

3. It ill becomes the Government now to argue that the grand jury refreshment procedure below involved evidence which was merely "cumulative or peripheral" (GB 15). In the trial court and in the Court of Appeals the Government urged that matters as to which grand jury transcript was used for refreshment involved "salient points" which were "critical" to its case (Pet. 14). Moreover, elsewhere in its Brief in Opposition in this Court, the Government has indicated that it was under a "compelling need to use the grand jury minutes" for refreshment (GB 12). And it admitted that the grand jury minutes actually refreshed witnesses' recollections on three occasions, and that on six occasions the witnesses, although not being refreshed, adopted what they had said before the grand jury (G.B. 15).[5] It could hardly be clearer that in these instances petitioner was deprived not only of the privilege of further refreshment of these witnesses' recollections but of its basic right of cross or redirect examination upon points which, precisely because critical to the prosecution, were of the utmost importance to the defense; this right could be effectively exercised only after inspection of the grand jury transcript covering these points.

The basic authority relied upon by the Government is the 1940 decision of this Court in *United States* v. *Socony-*

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5. The Government's statement that in 15 instances where reading of the grand jury transcript did not refresh the witness' recollection, "the matter was at an end" (GB 15), is contrary to the record facts. In many instances where the witness indicated that his recollection was not refreshed, Government counsel repeated the reading of the refreshment material and questioned the witness again and again on the point, coming very close to impeachment (see Pet. 16, n. 28; see also Pet. A-78-80, 91-96, 100-102).

Vacuum Oil Co., 310 U.S. 150 (1940). In our petition, we have shown that that case has no application to the present matter since it involved refreshment only on "minor facts" and testimony which was "either cumulative or dealt only with the minutiae of the conspiracy" (Pet. 14).[6] In a footnote (GB 14, n. 5) the Government suggests that petitioner "does not ask that *Socony-Vacuum* be re-examined." Because it is distinguishable on its facts, such re-examination appears unnecessary. However, to the extent that the holding or the philosophy of *Socony-Vacuum* may be in conflict with the principles more recently set forth in *Pittsburgh Plate Glass* and *Procter & Gamble*, then *Socony-Vacuum* should be re-examined, and this is an additional reason for the grant of certiorari herein.[7]

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6. Making no claim at all that the procedure utilized here was a fair one, the Government urges the need for maintaining the secrecy of grand jury proceedings in order that it may obtain willing witnesses (GB 12). This is a lame argument. Once partial disclosure has been made—*at the Government's own election*—there can be little, if any, difference in the degree of reluctance to testify if this and other testimony concerning the same subject matter is thereafter inspected by defense counsel.

7. Under the heading "The Evidence" in its statement of the case (GB 3-7) the Government set forth what is little more than a paraphrase of the indictment allegations and the Government's bills of particulars, entirely ignoring the substantial evidence that dairies distributing milk in glass gallon jugs were the aggressors in the sporadic price wars here in question, and that petitioner's conduct was defensive rather than predatory, and independent rather than conspiratorial. As the Court of Appeals noted (Pet. A-2), the jury deliberated for nearly 3 days before reaching a verdict in this case. We urge that the one-sided grand jury refreshment procedure may well have swung the balance against petitioner on the 13 counts under which it was found guilty.

QUESTION 2

The Trial Court's Instructions to the Jury on the Robinson-Patman Charges

In its Brief in Opposition, the Government makes no effort to deny or explain its admission in the Court of Appeals that the trial judge erred in his instructions to the jury concerning "cost" (see Pet. 19). Neither does it make any explanation as to why—having assured this Court on the constitutionality appeal that the present indictment charged petitioner with selling at prices below its "own costs of production"—it urged upon the trial court and the Court of Appeals that it was sufficient for it to prove sales at prices below "fully distributed costs" (*ibid*).

On the question of the trial court's charge to the jury on intent, the Government does not deny that the jury was instructed in terms of "general" intent under the Sherman Act counts, and it is unable to cite a single instance where the trial court informed the jury that a different character of proof was required to establish "specific" intent under the Robinson-Patman Act counts. In fact, the trial court instructed but once on *how* the jury was to determine intent (". . . the law presumes that persons must be held to have intended the necessary and direct consequences of their acts . . ."—Pet. A-201, n.). The instruction that a workman causing a death by throwing a beam down into the street "is dealt with as if he foresaw it," and "is guilty of murder" clearly carried the presumed intent concept into the Robinson-Patman counts (see Pet. A-201), and the trial judge's repeated calling of the jury's attention to the alleged "effects" of petitioner's pricing (see Pet. A-204-07) could only heighten the jury's impression that the requisite improper intent could be presumed therefrom.

In arguing that the defense has "the burden of coming

forward with evidence on meeting competition" and that the Government need not "negative . . . possible justifications" (GB 19), Government counsel repudiate entirely the earlier representations to this Court that petitioner was charged with selling "at less than [its] own costs, *without reasonable justification,*" and "[u]nless the government proves this misconduct there must be an acquittal."[8]

In short, the specious arguments now made by the Government in defense of the trial judge's prolix and confusing instructions are a far cry from the unqualified representations concerning the precise elements of the crime charged against petitioner which the Government made to this Court in support of Section 3's constitutionality. Although this Court upheld the constitutionality of Section 3 as applied to the specifically limited charges of the present indictment (see Pet. 5-6), the trial judge's jury instructions permitted conviction of petitioner without proof of either the "below cost" or "specific intent" elements of those charges: the jury was instructed that its "ultimate duty" was to determine whether petitioner's challenged prices "were or were not unreasonably low" (Pet. A-200). The Court of Appeals for the Eighth Circuit, upholding the trial judge's instructions, thereafter adopted a non-objective interpretation of Section 3 which is not only of questionable constitutionality, but broadly departs from the standards laid down by this Court for this case in *United States* v. *National Dairy Products Corporation*, 372 U.S. 29 (1963).[9]

The result is that present guidelines for Section 3—for the district courts as well as for businessmen—are conflict-

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8. Government Brief on Reargument, United States v. National Dairy Products Corporation, No. 18, 1962 Term, p. 18 (emphasis added). See also Pet. 24, n. 50.

9. See Pet. 6-8, 20.

ing and highly confused. Having general application to the subject of pricing, Section 3 bears directly upon the national economy, and its scope and meaning are of the utmost importance. A pronouncement by this Court clarifying the standards governing its application is essential.

CONCLUSION

For all the reasons hereinabove set forth and in the earlier petition, the petition for a writ of certiorari should be granted.

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